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82-1646

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROLLS-ROYCE LIMITED,

Petitioner,

v.

J. WILLARD NALLS, JR., As Administrator for the Estate of JOHN C. ABRAHAM, Deceased, and CAROL E. RAMAMURTI, As Administratrix For the Estate of CHINNI P. RAMAMURTI, Deceased,

Plaintiffs-Respondents,

AIR INDIA, INC., and AEROSPATIALE (SNIAS) (Societe National Industrielle Aerospatiale),

Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the denial of a motion to dismiss on grounds of *forum non conveniens* is an appealable order under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and related cases.

2. Whether under *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), and related cases, a complaint should be dismissed on grounds of *forum non conveniens* where all the relevant events occurred abroad, virtually all the evidence and witnesses are abroad, the applicable law is foreign, numerous identical cases arising from the same events are already pending abroad, and no nexus of any kind exists between the forum and the litigation.

PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the court below are those named in the caption. Like petitioner,[1] Air India, Inc., and Aerospatiale (SNIAS) (Societe National Industrielle Aerospatiale) are both defendants in the District Court. A former defendant, Indian Airlines, was previously dismissed for lack of jurisdiction.

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[1] All of petitioner's stock is held by instrumentalities of the Government of the United Kingdom. All of its subsidiaries and affiliates are wholly-owned except:

Rolls-Royce and Japanese Aero Engines Limited
Rolls-Royce Turbomeca Limited
Turbo-Union Limited
Deeside Titanium Limited
Dulles International Aeroservices, Inc.
Cooper-Rolls Inc.
Cooper-Rolls Corp.
Commonwealth Aircraft Corp. Pty. Limited

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AIR INDIA, INC., and AEROSPATIALE (SNIAS) (Societe National Industrielle Aerospatiale),

Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Rolls-Royce Limited ("Rolls-Royce") respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered in these proceedings.

OPINIONS BELOW

The order of the Court of Appeals denying rehearing *en banc*, together with the Statement of Circuit Judge Wil-

key as to Reasons for Voting for En Banc Consideration, which Circuit Judge MacKinnon joined, is not reported, but is reprinted at Appendix A. The order of a panel of the Court of Appeals (Circuit Judge Bork not participating) dismissing the appeals for lack of jurisdiction is not reported, but is reprinted at Appendix B. The memorandum order of the District Court (Penn, J.) denying the motion of Rolls-Royce to dismiss the complaints on grounds of *forum non conveniens* is not reported, but is reprinted at Appendix C.

JURISDICTION

The order of two members of a panel of the Court of Appeals dismissing the appeals for lack of jurisdiction was entered on December 22, 1982. A timely petition for rehearing and reconsideration *en banc* was denied on March 8, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1291 of Title 28 of the United States Code provides as follows:

> "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) of this title."

STATEMENT OF THE CASE[1]

A. Background.

These cases[2] involve complaints filed against two Indian airlines, a French aircraft manufacturer and a British manufacturer of jet engines by the estates of two Indian nationals killed in the crash of a domestic Indian flight near Bombay. One of the Indian airlines operated the flight, while the other is alleged to have been responsible for the aircraft's maintenance. The airline that operated the flight has already been dismissed for lack of personal jurisdiction. Plaintiffs selected the District of Columbia as their forum although they do not reside here, no evidence is here, virtually all the evidence is abroad, every substantive issue will be governed by foreign law, and numerous identical lawsuits arising from the same accident—fifty-four cases involving more than 300 claimants—are now pending in London before the English High Court.

These cases have no connection with the District of Columbia. Neither plaintiff resides in the District. Their decedents never resided here. Carol Ramamurti, a resident of the State of Washington, filed her complaint as personal representative of Dr. Chinni P. Ramamurti. He was an Indian national and naturalized American citizen,

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[1] The essential facts are summarized in the Statement in the Court of Appeals joined by Circuit Judges Wilkey and MacKinnon and reprinted below at App. 1a. With one exception, *infra* at 8 n. 26, petitioner does not dispute that summary.

[2] Two cases were brought in the District Court, one by J. Willard Nalls and the other by Carol E. Ramamurti, Civil Action Nos. 77-01740 and 77-01256, but the District Court's denial of motions to dismiss on grounds of *forum non conveniens* resulted in consolidated appeals, Nos. 82-1975, 82-1976 and 82-2033.

who was a resident of the State of Washington.[3] At the time of his death, Dr. Ramamurti was en route to visit his family in Madras.[4] J. Willard Nalls, a resident of Maryland, filed his complaint as personal representative of Dr. John C. Abraham. Mr. Nalls has no personal knowledge of any aspect of the case.[5] Dr. Abraham was a citizen and resident of India.[6] At the time of his death, he was returning to his home in Vellore, India.[7]

No event relevant to the liability of the defendants occurred anywhere in the United States. The flight on which the decedents died was operated wholly within India by Indian Airlines, which has already been dismissed from these cases for lack of jurisdiction.[8] The aircraft was maintained in India by Indian Airlines and/or Air India. It was manufactured in France by Aerospatiale. Its engines were manufactured prior to 1968 in the United Kingdom by Rolls-Royce.

Rolls-Royce is charged with negligence in connection with one of the aircraft's engines. There is no witness in the United States whose testimony could be relevant to Rolls-Royce's liability.[9] No documents or records relating

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[3] Ramamurti Answers to Interrogatories 28 and 35 propounded by Air India, March 7, 1978.

[4] Deposition of Carol Ramamurti, March 31, 1980, at 5.

[5] Deposition of J. Willard Nalls, April 1, 1980, at 6-8, 16, 25.

[6] Deposition of Aleyamma Abraham, April 4, 1980, at 14, 18.

[7] Deposition of Aleyamma Abraham at 15-16.

[8] *Ramamurti* v. *Rolls-Royce Ltd.*, 454 F. Supp. 407, 413 (D.D.C. 1978).

[9] The only possible exception is a single Rolls-Royce employee who, as Circuit Judge Wilkey observed (App. at 3a), was only tangentially involved, and who, at the time of the *forum non conveniens* motion, had been assigned from the United Kingdom to Seattle. *See* Rolls-Royce's principal brief in the Court of Appeals, at 5 n.6, 6 n.5.

to the engine have ever been maintained in the United States.[10] The complaints were served upon Rolls-Royce through a governmental liaison office maintained in the District of Columbia by an American subsidiary of a Canadian subsidiary.[11] Neither the American subsidiary nor its liaison office ever had any connection with the engine, and none of their personnel or records will be sources of proof in these cases.[12] All the liability evidence regarding Rolls-Royce must be obtained outside the United States.

Nor is there any evidence in the United States relevant to the liability of the other defendants. The crash occurred near Bombay, where any witnesses presumably reside. The remnants of the aircraft are in India. Evidence regarding the aircraft's operation and maintenance must be found in India. Evidence regarding the aircraft's manufacture must be found in France. Even evidence regarding damages must, in substantial part, be obtained abroad. Plaintiff Nalls has no personal knowledge of any relevant facts.[13] His decedent's widow knows little about her husband's finances, and such evidence must be obtained from his employer or family in India.[14]

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[10] Affidavit of Richard Keep, attached to Rolls-Royce's *forum non conveniens* motion in the District Court as Exhibit 1, paras. 3, 5. The affidavit is reproduced in the Joint Appendix ("J.A.") in the Court of Appeals at 60-64.

[11] At all times material here, the petitioner's only legal relationship with the firm which manufactures automobiles under the name Rolls-Royce was through a trademark license.

[12] Keep Affidavit, paras. 4, 5 (J.A. 60-61).

[13] Deposition of J. Willard Nalls, *passim*.

[14] Deposition of Aleyamma Abraham at 85-86; Statement of Circuit Judge Wilkey, App. at 3a.

These are not the only cases that have arisen from the accident. Fifty-four similar actions against these and other defendants are now pending in London before the English High Court.[15] The claims made by the London plaintiffs parallel those made here. If these actions proceed in the District of Columbia, they will inevitably duplicate the litigation in London. Much or all of the discovery is likely to repeat any that may be sought by the London plaintiffs; and all liability evidence will undoubtedly be identical.[16]

None of the substantive issues will be governed by American law. Plaintiffs concede that liability will be controlled by the Fatal Accidents Act of India "and other applicable laws."[17] Those other "applicable laws" can only be Indian, English or French. The only possible relevance of American law will derive from use of the District of Columbia courts as the forum. For every other purpose, expert evidence will be required regarding arcane issues of foreign law.[18]

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[15] Keep Affidavit, paras. 6, 7 (J.A. 61); Statement of Circuit Judge Wilkey, App. at 3a, 5a.

[16] Keep Affidavit, paras. 7-9, 10 (J.A. 61-62).

[17] Ramamurti and Nalls complaints, at para. 1. Whichever foreign laws are ultimately held to govern the litigation, the English courts have an expertise that cannot be duplicated in any other forum. In addition to expertise in their own laws, the English courts are also far better equipped to decide issues of Indian law. The Indian law of torts, and particularly the Indian Fatal Accidents Act, derive directly from English law and continue to be guided by English decisions. M. David, *Indian Legal and Constitutional History* 213-17, 227 (1968); S. Ramaswamy, *The Law of Torts* 22, 61-68 (7th ed. 1975). The Indian Fatal Accidents Act was directly modeled upon an English statute adopted nine years earlier, and is still interpreted by light of English decisions, including decisions to the present day. *Id.*

[18] Statement of Circuit Judge Wilkey, App. at 4a.

B. Proceedings Below.

Immediately after the filing of these complaints, Rolls-Royce moved to dismiss on the ground that the District Court lacked personal jurisdiction. In so doing, Rolls-Royce expressly reserved its right also to move to dismiss on grounds of *forum non conveniens*. The Court of Appeals subsequently held in an unreported *per curiam* memorandum that the District Court has technical jurisdiction over all defendants except Indian Airlines, but noted that this was "without prejudice" to a *forum non conveniens* motion, and also recognized that there is a "need to avoid overburdening the District of Columbia courts."[19] Rolls-Royce promptly moved to dismiss on grounds of *forum non conveniens*. All briefing on the motion was complete by May 1980, and Rolls-Royce joined plaintiffs in urging expedited consideration of the motion. On July 23, 1982, more than two years later and without first hearing oral argument, an overburdened District Court issued a short memorandum order denying the motion.[20] In so doing, it acknowledged that a "close question" was involved, and that litigation here would cause "inconvenience" to Rolls-Royce and other defendants.[21]

Rolls-Royce immediately asked the District Court to certify the order for appeal pursuant to 28 U.S.C. § 1292(b). The motion was eventually denied without explanation. In the interim, Rolls-Royce filed timely notices of appeal under 28 U.S.C. § 1291. Plaintiffs' motion to dismiss those appeals was subsequently granted without

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[19] Memorandum Opinion at 7 n.4, 5 n.3 (Jan. 17, 1980).

[20] App. at 16a.

[21] *Id.* at 18a, 19a.

explanation by two judges of the Court of Appeals.[22] Rolls-Royce filed a timely petition for rehearing and reconsideration *en banc*, which was denied by a one-sentence order dated March 8, 1983.[23]

Circuit Judge Wilkey, joined by Circuit Judge MacKinnon, filed an extensive Statement urging *en banc* consideration. The Statement is the only detailed analysis of appealability and *forum non conveniens* prepared in these cases by either court.[24] Judges Wilkey and MacKinnon first emphasized that *forum non conveniens* is "a difficult legal question," on which Rolls-Royce had "at the very least" made a "strong case for dismissal."[25] After evaluating the public and private interests,[26] they found that the District Court's cursory order failed to apply, or even "to mention," the applicable legal standards, and that it had given "only incomplete attention" to the decisions of this Court.[27] Judges Wilkey and MacKinnon concluded that the District Court erred, and that the denial of appellate review had caused a failure "to do justice to these litigants and to protect our circuit from abuses of jurisdiction such as this."[28]

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[22] *Id.* at 15a.

[23] *Id.* at 1a.

[24] *Id.* at 14a.

[25] *Id.* at 2a.

[26] *Id.* at 2a-4a. In one respect, Judge Wilkey erred in his summary of the relevant facts. In assuming that "all" the defendants may be sued in the District of Columbia, he overlooked the fact that a particularly important defendant, the airline which operated the aircraft, has already been dismissed for lack of personal jurisdiction.

[27] *Id.* at 14a.

[28] *Id.*

With respect to appealability, Judges Wilkey and MacKinnon found that these cases satisfy all the requirements for immediate appeal under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Precisely as *Cohen* demands, they found first that the District Court's decision is "conclusive for practical purposes."[29] Second, the District Court's order decides "an important issue collateral to the merits."[30] Third, the order is "effectively unreviewable on appeal from the final judgment on the merits."[31] Judges Wilkey and MacKinnon concluded that, consistent with *Cohen* and subsequent cases, the appeals were wrongly dismissed.[32]

REASONS FOR GRANTING THE WRIT

These cases present important issues of the proper application of two lines of decisions by this Court, about which substantial uncertainty now exists in the lower courts. The principal issue is whether orders denying motions to dismiss on grounds of *forum non conveniens* are appealable under 28 U.S.C. § 1291 pursuant to *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*. Circuit Judges Wilkey and MacKinnon concluded that such orders fully satisfy the requirements of *Cohen*, and are appealable. Although no other opinion on the issue was written in these cases, the other participating members of the Court of Appeals presumably disagreed. So far as Rolls-Royce is aware, no decision of the issue by any court has ever been publicly reported. In these circumstances, neither litigants nor the lower courts can know with

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[29] *Id.* at 6a.

[30] *Id.*

[31] *Id.* at 10a.

[32] *Id.*

certainty whether, or in what situations, appellate review is available from the denial of *forum non conveniens* motions.

The uncertainty left by the one-sentence order of the Court of Appeals is the worst of all worlds. If Judges Wilkey and MacKinnon are correct, and an appeal properly lies under *Cohen*, uncertainty and confusion will cause unnecessary motions for certification under Section 1292(b) and wrongly discourage timorous litigants from appeal. Cases that should be dismissed after appeal will continue to impose needless burdens on inappropriate forums. If, on the other hand, no appeal lies, uncertainty will wrongly encourage bolder litigants to seek appellate review. The costs of uncertainty grow higher as transnational cases, such as this, become increasingly common. Only guidance from this Court can eliminate unnecessary burdens and costs by clarifying the application of *Cohen*.

The second issue is whether under *Piper Aircraft Co.* v. *Reyno*, *supra*, and related cases, complaints alleging transnational torts should be dismissed on grounds of *forum non conveniens* where, as here, the relevant public and private interests show overwhelmingly the efficiency of litigation elsewhere, and no nexus of any kind exists between the forum and the alleged tortious conduct. Although this issue was not reached by the Court of Appeals, it is ripe for resolution and no purpose would be served by remand. Moreover, this too is a matter as to which guidance from this Court is urgently needed. Multinational disputes, such as this, impose wholly disproportionate burdens on the courts. International discovery is inevitably prolonged, pretrial proceedings are complex, and arcane issues of foreign law must be resolved. Where, as here, there is "assurance" that a more convenient forum exists, and "absolutely no connection" be-

tween the forum and the dispute, lower courts should be instructed to prevent "abuses of [their] jurisdiction."[33] These cases show vividly that additional guidance from this Court is imperative to prevent such abuses.

I.

Review Should Be Granted To Confirm And Clarify The Applicability Of Cohen.

This Court has repeatedly declared that orders which conclusively determine significant issues separable from and collateral to the merits of a case, and which will result in irreparable loss if immediate appeal is denied, are "final" within the meaning of 28 U.S.C. § 1291. *E.g.*, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. at 545-47.[34] Judges Wilkey and MacKinnon showed clearly that these cases fully satisfy the requirements of *Cohen* for immediate appeal. Without review by this Court, however, the one-sentence order of the Court of Appeals will result in substantial confusion and uncertainty regarding the applicability of *Cohen* to *forum non conveniens* motions.

Cohen was a stockholder's derivative action. A state statute provided that defendants in such actions could require plaintiffs to post security for the defendants' costs and attorneys' fees. The statute authorized courts to determine the appropriate security and to adjust the

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[33] App. at 14a.

[34] *See also Moses H. Cone Mem. Hosp.* v. *Mercury Const. Corp.*, 51 U.S.L.W. 4156 (U.S. Feb. 23, 1983); *Firestone Tire & R. Co.* v. *Risjord*, 449 U.S. 308, 374-75 (1981); *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978); *Abney* v. *United States*, 431 U.S. 651, 658-62 (1977); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170-172 (1974).

amount whenever desirable. The District Court in *Cohen* denied the defendant's application for security, holding that the state statute did not apply to diversity actions in the federal courts. This Court held that the District Court's order was "final" within the meaning of 28 U.S.C. § 1291 because it was

> "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." 337 U.S. at 546-47.

For this purpose, the Court was careful to distinguish orders that are only "tentative, informal or incomplete," or simply "steps" that will "merge" into and may be reviewed with the ultimate judgment. *Id.* It emphasized that Section 1291 must be given a "practical rather than a technical construction." *Id.* at 546.

The order in *Cohen* was held to be "concluded and closed" because there was nothing tentative or incomplete about the denial of security. *Id.* at 546. To illustrate the rule, the Court contrasted orders setting the amount of security, which could be altered under the state statute whenever appropriate. The Court emphasized that appeals from such temporary and adjustable orders would present "a different question." *Id.* at 547. Moreover, an order denying security could not be effectively reviewed in any appeal taken after the case's ultimate disposition. At that stage, the defendant's statutory right to security would have been "lost, probably irreparably." *Id.* at 546.

The Court recently provided succinct statements of the *Cohen* rule in *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. at 375, and *Moses H. Cone Mem. Hosp.* v. *Mercury Const. Corp.*, 51 U.S.L.W. at 4158. In both cases, it quoted *Coopers & Lybrand* v. *Livesay*, *supra*, as follows:

> " '[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.' "[35]

Applying the "practical" rather than "technical" construction commanded by *Cohen*, the Court has held appealable the denial of a motion to dismiss an indictment on double jeopardy grounds. *Abney* v. *United States*, *supra*. Obviously, denials of motions to dismiss indictments are often not "final," but the Court concluded that it would be too late after a second trial to review the denial of motions based upon double jeopardy. *See also Moses H. Cone Mem. Hosp.* v. *Mercury Const. Corp.*, *supra* (order staying proceedings appealable under *Cohen*). Similarly, the Third Circuit has held that the denial of a motion for summary judgment, although usually not "final," is appealable under *Cohen* where the motion asserts absolute immunity from suit. *Forsyth* v. *Kleindienst*, 599 F.2d 1203 (3d Cir. 1979), *cert. denied sub nom. Mitchell* v. *Forsyth*, 453 U.S. 913 (1981).

Judges Wilkey and MacKinnon showed clearly that the District Court's order here is a final collateral order

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[35] In *Risjord*, the Court held unreviewable an order denying a motion to disqualify counsel, finding that "[t]he propriety of the district court's denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is normally only after final judgment." 449 U.S. at 377. The Court found the *Cohen* rule inapplicable to class certification decisions in *Coopers & Lybrand* because such decisions can be reversed by the trial court, are "enmeshed" in the merits of the action, and are subject to effective review with the final judgment. 437 U.S. at 468-69. *See also Moses H. Cone Mem. Hosp.* v. *Mercury Const. Corp.*, 51 U.S.L.W. at 4159 n.14.

appealable under *Cohen*.[36] The order is not "tentative, informal or incomplete." Fully and finally, it denies Rolls-Royce's contention that it should not be compelled to defend itself in a duplicative and remote forum unrelated to the controversy.[37] The decision cannot be "adjusted;" the question of the forum's appropriateness is by its nature conclusively resolved at the outset of the case.[38] Nor does the appropriateness of the forum have any relationship to the underlying merits of the actions. Plaintiffs have never identified any substantive right that would be lost if they joined their actions with numerous other claimants whose cases are pending in London. Finally, despite the obvious importance of the ruling, it will as a practical matter be impossible for Rolls-Royce to obtain review after trial.[39] Like the right to security *pendente lite* in *Cohen*, Rolls-Royce's right to be protected against duplicative and remote litigation will be irrevocably lost if the litigation goes forward.

Without review by this Court, Rolls-Royce will be denied any realistic opportunity for appeal. Moreover, the only guidance for litigants and the lower courts as to the appealability of similar decisions will be a one-sentence order and the Statement of Judges Wilkey and MacKinnon, neither of which may be publicly reported. Confusion and uncertainty are inevitable, and with them will come needless costs and burdens. Only review by this

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[36] App. at 5a-13a.

[37] App. at 6a (". . . the district court's decision is conclusive for all practical purposes.")

[38] This Court pointed out in *Moses H. Cone Mem. Hosp.* that only those pretrial orders "as to which some revision might reasonably be expected in the ordinary course of litigation" are excluded from *Cohen*. 51 U.S.L.W. at 4159 n. 14.

[39] App. at 10a (". . . the district court's decision is effectively unreviewable on appeal from the final judgment on the merits.")

Court can eliminate those costs and burdens by clarifying the applicability of *Cohen*.

II.

Review Should Be Granted Of The Failure To Dismiss On Grounds Of Forum Non Conveniens

Review should also be granted of the refusal to dismiss the complaints on grounds of *forum non conveniens*. Although the Court of Appeals did not decide the issue, it is ripe for resolution and a remand would only cause delay. The issue was briefed and decided in the District Court, briefed by both sides in the Court of Appeals, and carefully considered in the Statement joined by Circuit Judges Wilkey and MacKinnon. This Court has in analogous situations decided such issues,[40] and here, as in those situations, further proceedings in the Court of Appeals would only produce delay and additional cost.

Moreover, review of the *forum non conveniens* issue is needed to clarify prior decisions of this Court and prevent "abuse" of the lower courts' jurisdiction.[41] In *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), this Court made clear that dismissal on *forum non conveniens* grounds is appropriate whenever public and private interests show the greater efficiency of litigation elsewhere. In *Piper Aircraft Co.* v. *Reyno*, *supra*, the Court explained that the asserted disadvantages to a plaintiff of a foreign forum do not justify litigation in an inconvenient forum in

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[40] *See, e.g., Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964); *Land* v. *Dollar*, 330 U.S. 731 (1947); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945). *See also Abney* v. *United States*, *supra*; *Eisen* v. *Carlisle & Jacquelin*, *supra*; *Moses H. Cone Mem. Hosp.* v. *Mercury Const. Corp.*, *supra*.

[41] App. at 14a.

the United States. Here, however, the District Court gave "only incomplete attention" to this Court's instructions,[42] failed even "to mention" the applicable legal standards,[43] and thus failed to prevent "abuses of jurisdiction."[44] The result reached by the District Court is "diametrically opposite" the result reached by the Court of Appeals in an earlier case, and is inconsistent with the "relevant standards" established by this Court.[45] Review is essential to confirm and clarify the applicable standards in order to prevent such "abuses."

Judges Wilkey and MacKinnon showed that the failure to dismiss these cases was "error."[46] No nexus of any kind exists between these cases and the forum.[47] Neither plaintiffs nor their decedents have ever resided in the District. All the defendants are foreign. None of the relevant events occurred in the United States. All the liability evidence, as well as much of any damage evidence, must be found abroad. All substantive legal issues will be governed by foreign law. In these circumstances, neither public nor private interests can be served by maintaining complex and lengthy litigation in a District without any stake in its resolution. The inefficiency of litigation here is confirmed by the fact that numerous identical cases—some 54 cases, involving more than 300 claimants—are

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[42] *Id.* at 14a.

[43] *Id.*

[44] *Id.*

[45] *Id. Compare Pain* v. *United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

[46] *Id.*

[47] *Id.* at 4a. (These cases assert "claims under foreign law, aris[e] out of an accident which occurred in a foreign country, and [are] brought against foreign defendants by plaintiffs who have no connection whatsoever with the District of Columbia.")

already pending in London before the English High Court.[48]

The District Court's decision introduces confusion and uncertainty into the standards applicable to *forum non conveniens* motions. It conflicts both with the standards adopted by this Court and with earlier decisions of the Court of Appeals. Without review, complex and lengthy litigation will be permitted to remain in an inappropriate forum, and needless additional obligations will be imposed upon an already-overburdened court. Strong considerations of efficient judicial administration require review of the issues both of appealability and of *forum non conveniens*.

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[48] *Id.* at 5a. (The existence of the English cases "gives us the greatest possible assurance that plaintiffs may without demonstrable prejudice have resort to a foreign forum if the suit here is dismissed.")

CONCLUSION

A writ of certiorari should issue to review the order of the Court of Appeals in this matter.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
for the District of Columbia Circuit

Filed March 8, 1983

ORDER

The suggestion for rehearing *en banc* of Rolls-Royce Limited has been circulated to the full Court. A majority of the members of the Court have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the suggestion is denied.

Per Curiam

Circuit Judges MACKINNON and WILKEY would grant the suggestion for rehearing *en banc*. A statement of *Circuit Judge* WILKEY is attached.

Statement as to Reasons for Voting for En Banc Consideration

WILKEY, *Circuit Judge*, with whom joined MACKINNON, *Circuit Judge:* Appellants ask us to review the district court's decision not to dismiss the suit against them on *forum non conveniens* grounds. Two judges of the motions panel considering the appeal, without opinion, dismissed for lack of jurisdiction. I believe that justice requires consideration of the *forum non conveniens* and appealability issues presented by this case by a merits panel or, failing that, *en banc*.

I. *Forum non conveniens* ISSUES

As the district court acknowledged, defendants' *forum non conveniens* motion presents a difficult legal question. We set

forth the applicable standard for *forum non conveniens* dismissals in *Pain* v. *United Technologies Corporation*:[1]

> [A] district judge's *forum non conveniens* inquiry should proceed in four steps. As a prerequisite, the court must establish whether an adequate alternative forum exists which possesses jurisdiction over the whole case. Next, the trial judge must consider all relevant factors of *private* interests, weighing in the balance a strong presumption against disturbing plaintiffs' initial forum choice. If the trial judge finds this balance of the private interests to be in equipoise or near equipoise, he must then determine whether or not factors of *public* interest tip the balance in favor of a trial in a foreign forum. If he decides that the balance favors such a foreign forum, the trial judge must finally ensure that plaintiffs can reinstate their suit in the alternative forum without undue inconvenience or prejudice.

Private interest factors include matters such as the relative ease of access to sources of proof, availability of compulsory process, and the cost of obtaining attendance of witnesses; public interest factors comprise the burden imposed by the trial in the community, the degree of local public interest in the dispute, and whether local or foreign law will be applicable.[2] Finally, *Pain* noted that the plaintiff's citizenship and residence in the United States merit no special consideration in this balancing process.[3]

A consideration of these factors shows that, at the very least, appellants may make a strong case for dismissal on *forum non conveniens* grounds.[4] First, it is clear that there is

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[1] 637 F.2d 775, 784-85 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

[2] *Id.* at 782, 786-91 (private interest factors); *id.* at 791-95 (public interest factors).

[3] *Id.* at 795-99.

[4] Our discussion draws on the factual findings of the district court in *Nalls* v. *Rolls-Royce Ltd.*, Memorandum Order at 1-3 (D.D.C. 23 July 1982).

an adequate alternative forum which possesses jurisdiction over this case. Fifty-four related suits, arising out of this accident and brought against these same defendants, are now before the English High Court, in London, England. Were plaintiffs' suits to be dismissed here, they could be consolidated with those in London.

Second, as to the factors of private interest, the most critical fact is that no event relative to plaintiffs' claim occurred in the United States. The accident itself occurred in India; the airplane which crashed was maintained in India by two Indian airlines; the plane was manufactured in France, and its engine manufactured in England. Hence, with the exception of one Rolls-Royce employee, "tangentially involved" with the facts of this case, who has now been transferred to Seattle, Washington, witnesses and documentary evidence as to the manufacture, maintenance and flight of the airplane are in France, England or India. And while some witnesses—members of the plaintiffs' family—who might testify as to the issue of damages live in the United States, other witnesses on this issue as well might have to be brought from India, where Nalls' decedent was a citizen and resided at the time of the accident.

On the other hand, some private factors do favor a trial in the District of Columbia. The District is the only place in the United States where plaintiffs can acquire personal jurisdiction over all the defendants—Air India, the French manufacturer, and the British manufacturer who are defendants of the present suit. Plaintiffs live in the United States, and hence it may be more convenient for them to bring suit here than in England. And it is arguably no more inconvenient for witnesses to travel to Washington, D.C., than to London, England, although we note that it is certainly more inconvenient for them to have to attend trial in both cities than in one. Finally, plaintiffs have agreed to mitigate the inconvenience to Rolls-Royce to some extent by deposing Rolls-Royce employees in England.

Third, with regard to the public interest factors, it is striking that there is absolutely no connection between this suit and the

District of Columbia, although there are some contacts with other parts of the United States. One decedent, an American citizen, lived with his family in the State of Washington; the other was a citizen of, and lived in, India, although he had been educated in the United States and planned at some point to return to Baltimore, where his wife and family lived. As we noted in *Pain*, this lack of contact reflects adversely both on the justification for burdening the community with a lengthy and complicated trial and on the interest the community might have in conducting the trial locally. Moreover, the applicable law is entirely foreign—Indian, English or French. There is thus no local or federal policy which might be vindicated in the present suit. And the trial court will have to resolve difficult questions of foreign law on the basis of expert testimony.

Fourth, plaintiffs maintain that they would suffer inconvenience or prejudice by having to reinstate their suit in London. They suggest the unavailability of attorneys on a contingent fee basis and the possibility this suit will suffer lengthy delays there or be "confused" in the related suits already brought. But these fears are absolutely unsubstantiated in the record or in the trial court's opinion. We are hardly free to assume that English courts are unable to do justice to plaintiffs' claims, and know of no evidence that these courts are any more dilatory than their American counterparts.

It is questionable, to say the least, whether the presumption in favor of plaintiff's forum choice survives a balancing of either the private or the public interest factors. This is hardly surprising for a suit which asserts claims under foreign law, arises out of an accident which occurred in a foreign country, and is brought against foreign defendants by plaintiffs who have no connection whatsoever with the District of Columbia. This suit causes the expense and harassment to defendants and witnesses, and imposes the burdens on our courts, which the *forum non conveniens* doctrine aims to prevent. Moreover, the main factor which favors plaintiffs' suit here—the American nationality, residence, or intended residence of plaintiffs and decedents—is precisely the factor which we took great

care, in *Pain*, to identify as carrying no special weight in the balancing process.[5] Finally, the prosecution of fifty-four suits, arising out of the same accident and asserting similar claims, before the Queen's Bench of the English High Court gives us the greatest possible assurance that plaintiffs may without demonstrable prejudice have resort to a foreign forum if the suit here is dismissed. Whether we could, given these facts, sustain the district court's decision on appeal presents for me a difficult and important question of *forum non conveniens* law.

I. APPEALABILITY

Rather than having this court proceed to review these difficult and important questions of *forum non conveniens* law, the motions panel dismissed the appeal for lack of jurisdiction. Appellants had contended that this court had jurisdiction under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*[6] I believe that the motions panel erred in this regard, and that review of the district court's decision is appropriate *now*.

The *Cohen* rule defines certain trial court decisions to be "final" although these decisions do not definitively adjudicate the entire controversy between the parties. The rationale of the rule is that some district court decisions, although interlocutory, may irrevocably dispose of rights of the parties and therefore should be reviewable at once. In particular, *Cohen*, as interpreted by subsequent cases, establishes three criteria for reviewability: (1) the decision must be conclusive, *i.e.*, not open to further consideration by the district court; (2) the decision must resolve an issue *separate* from the merits, rather than be a step towards final decision merged within the final judgment; (3) the decision must be effectively unreviewable on appeal from the final judgment in the case—*i.e.*, parties' rights will be significantly undermined if review is postponed until

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[5] *See* 637 F.2d at 797-99.

[6] 337 U.S. 541 (1949).

after final resolution of all issues in the case. In sum, as the Supreme Court recently described the class of reviewable "collateral orders," "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."[7]

The instant case meets each of the three criteria for appealability. *First*, the district court's decision is conclusive for all practical purposes. While it is in theory possible that the district court may at some future point decide to dismiss on *forum non conveniens* grounds, it seems most unlikely that it would do so. Defendants have already laid before the court the various reasons why litigation in this forum would impose undue burdens on them, on witnesses and on the court. The court, not persuaded by these arguments now, is unlikely to change its mind after significant time and resources have already been invested in pleadings, discovery, and other preparation for trial. Moreover, given these factors discussed above, it is hard to imagine this case becoming any *less* appropriate for trial here than it already is.

Second, the district court order decides an important issue collateral to the merits. It is clear that the decision as to the appropriate forum does not require decision as to the merits of the controversy. And the decision as to the appropriate forum is in no way "merged" into a final judgment on the merits. This is because the rights at stake in these two decisions are fundamentally different. The decision on the merits, of course, disposes of plaintiff's substantive rights, while the *forum non conveniens* decision addresses defendant's rights (and the rights of other participants in the law suit) to be tried in a forum convenient to them and to be free from vexatious and harassing litigation.

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[7] *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). *See also Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 308, 374-75 (1981); *Abney* v. *United States*, 431 U.S. 651, 658-62 (1977); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170-72 (1974); *Cohen*, 337 U.S. at 545-47.

Moreover, the *forum non conveniens* decision is sufficiently important to warrant immediate review. The Supreme Court, when first establishing in *Gulf Oil Corp.* v. *Gilbert*[8] the power of the federal courts to dismiss cases on *forum non conveniens* grounds, declared the importance of *forum non conveniens* doctrine as a means of protecting the rights of litigants as well as promoting efficient administration of the courts.[9] As *Piper Aircraft Co.* v. *Reyno*[10] states, "[u]nder *Gilbert*, dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court"[11]—surely considerations of importance.[12]

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[8] 330 U.S. 501 (1947).

[9] *Id.* at 507-09.

[10] 454 U.S. 235 (1981).

[11] *Id.* at 249.

[12] Plaintiffs cite cases involving the choice of forum for arbitration proceedings, *Acton Corp.* v. *Borden, Inc.*, 670 F.2d 377, 380-81 (1st Cir. 1982); *USM Corp.* v. *GKN Fasteners, Ltd.*, 574 F.2d 17, 19 (1st Cir. 1978); *New England Power Co.* v. *Asiatic Petroleum Corp.*, 456 F.2d 183, 185-86 (1st Cir. 1972), to show that the rights protected by the *forum non conveniens* doctrine are too insignificant to warrant invocation of the collateral order doctrine. But cases involving choice of forum for arbitration are clearly distinguishable. Orders to arbitrate enforce a prior contractual agreement, and courts may justifiably conclude that the *place* of arbitration is less important to the parties when they have the opportunity to specify the place in the contract and fail to do so. Of course, no such prior agreement was possible in the present case. Moreover, arbitration agreements are made enforceable in court by a specific congressional enactment, the Federal Arbitration Act. This act strongly endorses values of the efficiency and speed of arbitration, values which would be undercut by extended litigation over the forum of arbitration. In contrast, no such congressional policy is at issue here. Finally, the inconvenience to the parties at issue in the choice of an arbitration forum will be much less than in the present case, because arbitration will generally occur within the United States and rely heavily on documentary evidence rather than live witnesses.

Plaintiffs also suggest that wholly discretionary decisions, such as consideration of *forum non conveniens* motions, should not be appealable under *Cohen* because they simply cannot present a question "too important to be denied review." Arguably, the exercise of the trial judge's discretion is less likely to be reversed and offers less reason for intervention to guide the trial court's decision.[13] But the Supreme Court decisions on the collateral order doctrine do not support the proposition that a discretionary decision is generally not appealable under this doctrine. The Supreme Court's general pronouncements in recent cases simply do not mention discretion at all as a factor to be considered. And the courts of appeals have, in numerous instances, granted review of collateral orders for abuse of discretion.[14]

The *Cohen* case did observe that "[i]f the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question."[15] But this delphic remark hardly precludes review of "discretionary" decisions under *Cohen* doctrine. Instead, this language could mean simply that

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[13] Of course, this argument, to the extent convincing, is a matter of intuition rather than logic, for one cannot deduce the answer to the empirical question of how often judges' decisions on a given issue are reversible from the standard of appellate review alone, without knowing how often in fact trial judges transgress that standard.

[14] *See, e.g., Lowe* v. *Pate Stevedoring Co.*, 595 F.2d 256, 257 (5th Cir. 1979) (award of attorneys' fees); *Caston* v. *Sears, Roebuck and Co.*, 556 F.2d 1305, 1308 (5th Cir. 1977) (appointment of counsel); *Flowers* v. *Turbine Support Division*, 507 F.2d 1242, 1244 (5th Cir. 1975) (permission to proceed in forma pauperis); *Garber* v. *Randell*, 477 F.2d 711, 715, 718 (2d Cir. 1973) (consolidation); *Norman* v. *McKee*, 431 F.2d 769, 773-74 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971) (approval of partial class settlement); *MacAlister* v. *Guterma*, 263 F.2d 65, 67, 69 (2d Cir. 1958) (pretrial consolidation).

[15] 337 U.S. at 547.

an order as to amount might not be reviewable because not conclusive—*i.e.*, because the district court retained discretion to modify the amount.

More importantly, even if *Cohen* does suggest that appellate courts should be more hesitant to grant immediate review of discretionary collateral decisions, its use of the term "discretion" is ambiguous. A decision may be "discretionary" either in the sense that there is "no law to apply"—*i.e.*, no standards to guide the trial court's decision—or in the sense that standards to be applied are sufficiently flexible and fact-dependent so that a broad range of outcomes will be reasonably consistent with the applicable standards. In the former case, courts of appeals may decline to review a collateral order because it is futile to attempt to second-guess what is essentially an arbitary decision. For example, in *United States* v. *Sorren*,[16] the court declined to review the trial court's refusal to grant an evidentiary hearing on the personal jurisdiction issues raised by *United States* v. *Toscanino*,[17] because "the remand in *Toscanino* explicitly granted the district court discretion to determine whether such an evidentiary hearing was warranted."[18] The *Toscanino* issue exemplifies the case in which the district court exercises discretion because there is no law to apply; as to the circumstances in which the trial court enjoyed discretion as to whether to hold a hearing, the court's remand was essentially standardless.[19]

An exemplary case of the second type of discretionary decision—a decision guided by flexible, open-ended standards—is the Supreme Court decision in *Stack* v. *Boyle*.[20]

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[16] 605 F.2d 1211 (1st Cir. 1979).

[17] 500 F.2d 267 (2d Cir. 1974).

[18] 605 F.2d at 1215.

[19] 500 F.2d at 281. *See also Midway Mfg. Co.* v. *Omni Video Games, Inc.*, 668 F.2d 70, 72 (1st Cir. 1981) (no statutory standards at all governing the decision that the court declined to review).

[20] 342 U.S. 1 (1951).

There the Court held reviewable under the collateral order doctrine the question whether bail was "excessive." Clearly, the decision fixing the amount of bail is discretionary in the second sense noted above, for this decision is general[ly] acknowledged to leave much leeway to the judicial officer below.[21] Nonetheless, the Supreme Court held the decision immediately reviewable. Moreover, the Court's reasoning confirms that *Cohen's* dictum as to the nonreviewability of "discretionary" orders refers to discretion in the sense of "no law to apply." In *Stack*, "[p]etitioners' motion to reduce bail did not merely invoke the discretion of the District Court setting bail within a zone of reasonableness . . . As there is no discretion to refuse to reduce excessive bail, the order denying the motion to reduce bail is appealable . . . [citing *Cohen*]."[22] Once within the zone of reasonableness, the amount of bail, like the amount of security in *Cohen*, is an essentially standardless decision which it would be futile to review; but review of the discretionary collateral order is available to determine whether the decision lies within that zone—*i.e.*, reasonably applies relevant legal standards.

Similarly, *forum non conveniens* law comprises flexible standards whose application by the trial court should be immediately reviewable for abuse of discretion. We set out these standards in *Pain* v. *United Technologies Corp.*[23] To use the "discretionary" label as a way of deprecating the importance of the *forum non conveniens* decision ignores the expense, hardship and injustice to parties and witnesses, as well as costs to the administration of justice, which trial in the wrong forum may cause. *Forum non conveniens* motions thus present an issue collateral to the merits and important enough to warrant prompt review.

Third, the district court's decision is effectively unreviewable on appeal from the final judgment on the merits. The

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[21] *See, e.g., Allen* v. *U.S.*, 386 F.2d 634, 636 (D.C. 1967).

[22] 342 U.S. at 6.

[23] 637 F.2d at 781-85.

rights conferred by *forum non conveniens* law—the right not to be tried in an unreasonably inconvenient forum—will be effectively extinguished if review is postponed. Perhaps the closest analogy would be a district court's denial of a motion to dismiss on double jeopardy grounds. As the Supreme Court held in *Abney* v. *United States*,[24] the right conferred by the double jeopardy clause—the right *not to stand trial* a second time for the same offense—is effectively denied when the trial proceeds, regardless of its outcome. Similarly, as the Court notes in *Abney*,[25] the *Cohen* case—which established the collateral order doctrine—can be interpreted to hold that at stake there was the right of the corporation *not to stand trial at all* unless the shareholder suing derivatively posted security for defendant's cost of litigation. Such a right not to stand trial is at issue in the present appeal. After the trial is concluded, all the expenses and burdens of trial in the inconvenient forum have already been incurred. To delay review until a final judgment is entered is to deny review altogether.

Plaintiff-appellee notes that decisions on motions made under 28 U.S.C. § 1404(a), for transfer of cases from one court to another *within the United States*, are not appealable under the collateral order rule. Such motions, however, are clearly distinguishable in this context from motions to dismiss on *forum non conveniens* grounds. Indeed, *All States Freight* v. *Modarelli*,[26] a leading case on review of section 1404(a) motions, emphasizes that "the *forum non conveniens* doctrine is quite different from section 1404(a)."[27] On review of the same case, the Supreme Court quoted this language with approval in holding that section 1404(a) was a revision rather than merely a codification of *forum non conveniens* doctrine,[28] and the Court

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[24] 431 U.S. 651 (1977).

[25] 431 U.S. at 662 n.7.

[26] 196 F.2d 1010 (3d Cir. 1952).

[27] *Id.* at 1011.

[28] *See Norwood* v. *Kirkpatrick*, 349 U.S. 29, 31 (1955).

recently had occasion to reaffirm these differences in *Piper Aircraft Co.* v. *Reyno.*[29]

In particular, several of the differences between section 1404(a) and *forum non conveniens* motions suggest that denial of the latter should be appealable even though denials of the former are not. First, Congress' purpose in enacting section 1404(a) was to make the judicial process "cheaper and more convenient and, if possible, more prompt."[30] In deciding whether section 1404(a) motions are appealable, courts are inevitably bound to further Congress' purpose in enacting the statute; hence, considerations of speed and expense come to the forefront. These considerations of course militate against appealability under the collateral order rule. As *All States Freight* noted, "instead of making the business of the courts easier, quicker and less expensive, we [would] now have the merits of the litigation postponed while appellate courts review the question of where the case may be tried."[31] In contrast, *forum non conveniens* doctrine has its roots in the common law:[32] in deciding the appealability of rulings under this doctrine, considerations of expense and speed, though clearly significant, need not be paramount to the rights of litigants or to the public interests which the doctrine was designed to protect.

Second, section 1404(a) "was designed as a 'federal housekeeping measure,' allowing easy change of venue within a *unified federal system.*"[33] Therefore, significantly more is at stake for the parties in a *forum non conveniens* than in a section 1404(a) motion. For example, transfer under section

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[29] 454 U.S. 235, 253-55 (1981).

[30] *All States Freight*, 196 F.2d at 1011.

[31] *Id.*

[32] *See Piper Aircraft*, 454 U.S. at 248 n.13.

[33] *Id.* at 254 (quoting *Van Dusen* v. *Barrack*, 376 U.S. 612, 613 (1964)).

1404(a) cannot change the law applicable in the suit, while dismissing on *forum non conveniens* grounds may in effect force the suit to be brought in a jurisdiction applying different law.[34] And transfer to a foreign court may therefore solve problems associated with the American court's applying unfamiliar foreign law, while section 1404(a) cases never address this problem. More generally, the differences between trial in an American court and a foreign court will almost inevitably be greater than those between trial in two federal courts in the United States. Hence, when the defendant makes a *forum non conveniens* motion, he asserts interests which must transcend those which may be at stake in a section 1404(a) motion and which therefore may deserve more careful judicial consideration.

Of course, section 1404(a) transfers are analogous to dismissal under *forum non conveniens* law in some respects. First, both are discretionary with the district judge; second, the parties do not lose the rights secured by their underlying claims; third, interlocutory review would cause delay. The first point—the relevance of "discretion"—has been discussed. The second and third points do not distinguish these decisions from those for which review is available under the collateral order doctrine. All collateral orders preserve the appellant's underlying claims, for that is what makes them "collateral"; and all collateral orders are reviewable only at the cost of delay. So the fact that *forum non conveniens* and section 1404(a) motions also possess these features tells us nothing about why one or the other is, or should be, reviewable. Rather, what is relevant here are those features which both distinguish *forum non conveniens* from section 1404(a) motions and underscore the justification for prompt review of *forum non conveniens* decisions: the manifestly greater differences between U.S. and foreign, as opposed to two federal, forums; and the different purposes underlying the two doctrines.

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[34] *Compare Van Dusen* v. *Barrack*, 376 U.S. at 639, *with Piper Aircraft*, 454 U.S. at 247.

III. Conclusion

Thus, I conclude that the trial court's decision not to dismiss on *forum non conveniens* grounds meets the three criteria for appealability under the collateral order doctrine and therefore that the motions panel was incorrect to dismiss the appeal for lack of jurisdiction. The result of the dismissal is that no court has given full consideration to appellants' claims. No written opinion has been issued by this court on the questions of *forum non conveniens* or of appealability. This cursory treatment follows upon the disposition of these issues in the district court in a five-page opinion which failed to apply—indeed, failed to mention—the four-part test for the application of *forum non conveniens* doctrine laid down for this circuit in *Pain*, and which gave only incomplete attention to the applicable Supreme Court precedent. The district court thus failed to consider "all relevant factors" as required by *Pain*, while reaching a result diametrically opposite to the result we affirmed on the facts in that case. It is this decision—based on a failure to apply the relevant standards—which this court now declines to consider further. Moreover, the district court declined the request for certification of interlocutory appeal without opinion; thus, no court has even evaluated the appealability of this order in a written opinion.

At a minimum, we should remand to the district court for consideration of the *forum non conveniens* issue in light of the standards set down in *Pain*. More appropriate still would be full consideration by this court of the merits of appellants' claims. I am reluctant to recommend *en banc* consideration of any case. However, since the motions panel has declined to refer the case to argument on the merits, *en banc* consideration of the district court's decision here provides the only way to correct the district court's error and to reestablish a uniform rule for the circuit. Without such consideration, we fail to do justice to these litigants and to protect our circuit from abuses of jurisdiction such as this. On that basis, I believe that *en banc* consideration is justified, either on the merits or to direct that the case be reconsidered after argument before a panel to be selected in conformance with our usual practice.

APPENDIX B

United States Court of Appeals
for the District of Columbia Circuit

Filed December 22, 1982

ORDER

BEFORE: Wright and Bork, Circuit Judges and McGowan, Senior Circuit Judge

On consideration of appellee's motion to dismiss, the response thereto and of the reply, it is

ORDERED by the Court that the aforesaid motion is granted and these appeals are dismissed. It is

FURTHER ORDERED by the Court, *sua sponte*, that the Clerk withhold issuance of the mandate until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended June 15, 1982.

Per Curiam

Circuit Judge Bork did not participate in this order.

APPENDIX C

United States District Court for the District of Columbia

MEMORANDUM ORDER

These two cases arise out of a crash of an Indian Airlines Corporation airplane in the Republic of India during a regularly scheduled flight from Bombay, India to Madras, India, on October 12, 1976. The plaintiffs allege that the aircraft was a Caravelle manufactured in Toulouse, France, in 1967 by Aerospatiale (SNIAS) (Societe National Industrielle Aerospatiale). The case is now before the Court on the motions of the defendants to dismiss on the grounds of forum non conveniens.

I

The plaintiff, Carol E. Ramamurti and her daughter are American citizens. The decedent, Dr. Ramamurti was an American citizen and had been employed as a physician with Group Health Organization, practicing orthopedics and living in Seattle, Washington, for almost twenty years. Other than visiting relatives in India, Dr. Ramamurti had no contacts with India and none whatsoever with the United Kingdom. His family continues to reside in the Seattle area and his daughter attends the University of Washington in that city. His wife is the administratrix of his estate.

The plaintiff in the second case, J. Willard Nalls, Jr., is the administrator of the estate of John Abraham. Dr. Abraham was an eye specialist who attended Johns Hopkins Medical School in Baltimore, Maryland, and was licensed to practice in Maryland, Virginia and Florida. Although Mrs. Abraham is an Indian citizen, she and her daughter have qualified for permanent residence with the issuance of "green cards" and intend to become American citizens as soon as they have met their residency requirements. The family has relatives in India but

has no contact with the United Kingdom. The plaintiff represents that they are permanent residents in this country and that "only the sense of honor and obligation to the Seventh Day Adventist Church, which had supported and sponsored his [Dr. Abraham's] medical education, compelled him to return to India to repay his church, by serving his church." Plaintiffs Opposition at 10. They filed federal income tax returns for 1974, 1975 and 1976 and Mrs. Abraham continues to file such returns. She is employed at the University of Maryland Hospital as a nurse and they own a home in that state.

For the purposes of the pending motions, the Court is satisfied that the plaintiffs have permanent residence in the United States and that it is both logical and convenient for them to file these actions here.

Air India contends that under the criteria of *Gulf Oil Co.* v. *Gilbert*, 330 U.S. 501 (1947), the proper forum for the case is the Republic of India for the reason that the accident occurred there, the investigation of the accident took place there, the evidence concerning the accident is located there, and litigation concerning the accident is pending there. Air India does not however oppose the position of Rolls-Royce that the United Kingdom would also be an appropriate forum. It notes that Air India and Rolls-Royce are also parties to related litigation pending in the courts of the United Kingdom.

Rolls-Royce argues that the cases should be dismissed because the District of Columbia is not an appropriate forum. It contends that the proper forum for these cases is the United Kingdom. It notes that Dr. Ramamurti was visiting family members in India and that Dr. Abraham was returning to his home in Vellore, India, from a conference in Las Vegas. This defendant also relies on the following facts in support of its motion: (1) The connecting flight which crashed between Bombay and Madras was operated by Indian Airlines, an Indian corporation which is not present in this forum for jurisdictional

purposes,* (2) the Caravelle aircraft was manufactured in France, (3) Rolls-Royce, an English company, manufactured the Avon Jet Engines which powered the plane and (4) the manufacture of the engines took place entirely within the United Kingdom. Rolls-Royce conducted an investigation at the request of the Indian Court of Inquiry and tests on the engines and their components were conducted in the United Kingdom. The official written records of the investigation are located in India.

The defendants also note that 54 similar suits have been initiated before the Queen's Bench Division of the English High Court. Rolls-Royce contends that both private and public interest factors, *see Gulf Oil Corp.* v. *Gilbert*, *supra*, 330 U.S. at 508-509, "compel the conclusion" that this litigation should be pursued in the United Kingdom or possibly the Republic of India, but not in the District of Columbia which allegedly has no connection with the controversy.

II

Although the motions present a close question, the Court concludes that the motions to dismiss should be denied. "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Co.*, *supra*, at 508. The plaintiffs live in this country and witnesses on the issue of damages also live here. While it is true that many witnesses who would be called are located outside of the country, some would come from India and others from the United Kingdom, thus the United States is a midway point. Due to the fact that the aircraft and its components were manufactured in the United Kingdom and France, the aircraft crashed in India and the official report and investigation was performed there, and the plaintiffs and their witnesses live in this country, it is obvious that no matter where the case is tried someone will suffer an inconvenience. Rolls-Royce will have its

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*See *Ramamurti* v. *Rolls-Royce Ltd.*, 454 F. Supp. 407, 413 (D.D.C. 1978).

expenses minimized however since plaintiffs have agreed to have their counsel travel to England to depose Rolls-Royce employees. Moreover, there is an indication that some of the Rolls-Royce employees are or may be located in Seattle, Washington. Rolls-Royce being the employer will also be able to compel the attendance of its witnesses for any trial conducted in this country.

An additional concern in this case is the cost and availability of counsel for the plaintiffs if the case is dismissed. Plaintiffs are presently represented on a contigent fee basis by counsel who has almost 20 years experience in this specialized area of the law. If the cases are dismissed, representation for the plaintiffs in England will pose serious problems.

The fact that the substantive law in the United Kingdom or India may be less favorable to the plaintiff is no longer a basis to defeat a motion to dismiss on grounds of forum non conveniens. *Piper Aircraft Co.* v. *Reyno*, 102 S.Ct. 252, 265 (1981).

The Court notes also that plaintiffs choice of forum does not represent a misuse of venue and there is no suggestion that plaintiffs sought to file the case in the most inconvenient place for the defendants. While there is no doubt that the trial of the case in this forum will pose some inconvenience to the defendants, the Court concludes those defendants are better able to bear the inconvenience than the plaintiffs, and that there is no reason why the plaintiffs choice of forum should now be disturbed. In view of the above the Court concludes that the motions to dismiss should now be denied.

ORDER

It is hereby

ORDERED that the defendants motion to dismiss these cases on grounds of forum non conveniens is denied, and it is further

ORDERED that discovery may proceed.

Dated: July 23, 1982

Office-Supreme Court, U.S.
FILED
MAY 4 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1646

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROLLS-ROYCE LIMITED,

Petitioner,

v.

J. WILLARD NALLS, JR., As Administrator for the Estate of JOHN C. ABRAHAM, Deceased and CAROL E. RAMAMURTI, As Administratrix For the Estate of CHINNI P. RAMAMURTI, Deceased,

Plaintiffs-Respondents,

AIR INDIA, INC., and AEROSPATIALE (SNIAS) (Societe National Industrielle Aerospatiale),

Defendants-Respondents.

PLAINTIFFS-RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PLAINTIFFS-RESPONDENTS COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether certiorari should be granted to review an order of the Circuit Court of Appeals for the District of Columbia, which dismissed for lack of jurisdiction, an appeal from an order denying petitioner's motion to dismiss these actions on forum non conveniens grounds and to transfer these cases to the United Kingdom, when only two judges dissented from the denial of the motion for reargument en banc circulated to the full court, and the district court had declined to certify the issue for an interlocutory appeal pursuant to 28 U.S.C. 1292(b).

Whether denial of a forum non conveniens motion, which if granted, would result in a change of courtroom only, and was not certified for an interlocutory appeal under 28 U.S.C. 1292(b), is a "final order" under the doctrine of Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949).

PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the Court below are those named in the caption, as well as Air India, Inc. and Aerospatiale (SNIAS) (Societe National Industrielle Aerospatiale) who are defendants along with Rolls Royce in the District Court. Indian Airlines, a former defendant, was dismissed for lack of jurisdiction, but no order was entered pursuant to Rule 54(b), of the Federal Rules of Civil Procedure.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1646

ROLLS-ROYCE LIMITED,

Petitioner,

v.

J. WILLARD NALLS, JR., As Administrator for the Estate of JOHN C. ABRAHAM, Deceased and CAROL E. RAMAMURTI, As Administratrix For the Estate of CHINNI P. RAMAMURTI, Deceased,

Plaintiffs-Respondents,

AIR INDIA, INC., and AEROSPATIALE (SNIAS) (Societe National Industrielle Aerospatiale),

Defendants-Respondents.

PLAINTIFFS-RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Plaintiffs-Respondents J. Willard Nalls, Jr., as Administrator of the Estate of John C. Abraham, Deceased, and Carol E. Ramamurti, as Administratrix of the Estate of Chinni P. Ramamurti, Deceased, respectfully file this brief in opposition to the petition of Rolls Royce, Limited for a writ of certiorari.

OPINIONS BELOW

None of the opinions below are reported, but are reproduced here as part of the Plaintiffs-Respondents appendix.

STATUTORY PROVISIONS

Section 1291 of Title 28 of the United States Code provides:

> "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) of this title."

Section 1292(b) of Title 28 of the United States Code provides:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

STATEMENT OF THE CASE

A. History Of The Case

These actions arise out of an aircraft accident which occurred on October 12, 1976 at Bombay, India. The

Ramamurti complaint was filed October 4, 1977,[1] and the *Nalls* complaint was filed December 20, 1977[2] and assigned to Judge John J. Sirica. Both complaints alleged claims in negligence and breach of warranty against Rolls Royce, the engine manufacturer, and against Aerospatiale, the aircraft manufacturer and assembler; negligence was also alleged against Air India in maintaining the aircraft, and against the operator, Indian Airlines.

Rolls-Royce motion to quash service and dismiss for lack of *in personam* jurisdiction was denied on July 25, 1978. Rolls-Royce was found to be present and doing business in the District of Columbia,[3] and was required to answer. However, Rolls-Royce obtained leave for an interlocutory appeal, and on January 17, 1980, Judge Sirica's decision was affirmed, per curiam.[4]

On August 11, 1978, Rolls-Royce filed its answer, alleging as one of six (6) affirmative defenses, the inconvenience of the present forum,[5] but waited until April 17, 1980 after the decision of the jurisdiction appeal, to file its motion to dismiss on *forum non conveniens* grounds,[6] and to transfer these cases to the United Kingdom, which relief, in the alternative, was never requested at the time it filed its jurisdictional motion.

While the original motion on jurisdiction was pending Judge Sirica ordered a stay on liability discovery.[7] After

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[1] J.A. 14-24. All references preceded by the designation "J.A." refer to pages in the Joint Appendix in the Court of Appeals.

[2] J.A. 25-35.

[3] Ramamurti v. Rolls Royce, Ltd. 454 F.Supp. 407, 411-412 (D.D.C. 1978)

[4] *Id.* 198 U.S.App. D.C. 92, 612 F.2d 587 (D.C. Cir. 1980).

[5] J.A. 4; J.A. 36-46.

[6] J.A. 5.

[7] J.A. 1.

the Rolls-Royce motion was denied, plaintiff initiated requests for production from Rolls-Royce and Air India.[8] Rolls-Royce filed no objections to the request. However, when the Court of Appeals approved the petition for leave to appeal, at the telephone request of Rolls-Royce counsel, plaintiffs did not pursue production since it appeared likely that a formal motion for a further stay, during the appeal, would be granted. Air India, however, produced documents on September 26, 1979, prior to the decision on the appeal.

These actions were reassigned to Judge John Garrett Penn in the fall of 1979. After this Court affirmed Judge Sirica's decision, plaintiffs took steps to pursue discovery by moving to compel Rolls-Royce to produce the documents previously requested,[9] and also served requests for admissions on Rolls-Royce.[10] Rolls-Royce countered with a motion to stay all discovery pending the anticipated filing and hearing of a motion to dismiss on *forum non conveniens* grounds.[11] These motions were heard on April 1, 1980 before Magistrate Margolis, and on April 21, 1980, an order was entered staying all discovery during the pendency of the forum non conveniens motions.

Rolls-Royce deposed the plaintiffs in connection with the forum non conveniens motions. These depositions taken in early 1980, showed that plaintiff Carol E. Ramamurti and her daughter Kanti are native American citizens.[12] The decedent, Dr. Ramamurti was a natural-

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[8] J.A. 4.

[9] J.A. 5.

[10] J.A. 5.

[11] J.A. 5.

[12] Ramamurti Depo., pp. 3-4.

ized American citizen,[13] and had been employed as a physician with Group Health Organization, practicing orthopedics and living in Seattle, Washington, with his family for almost 20 years.[14] His accidental death in India, while on a visit to his family, was a mere coincidence. It was clear from the deposition of Mrs. Ramamurti, that aside from visits to his family, there were no contacts with India, none whatsoever with the United Kingdom, and that all of the basic, daily contacts in the life of Dr. Ramamurti and his survivors were in, and with, the United States. His daughter, Kanti Ramamurti expected to begin as a freshman at the University of Washington in the Fall of 1980.[15]

In the *Nalls* case, though the widow, Mrs. Abraham was an Indian citizen, she and her children had qualified for permanent residence with the issuance of "green cards" and intended to become American citizens as soon as they met residency requirements.[16]

It was clear, that although the Abraham survivors retained contacts with family in India, and were still Indian citizens, they had absolutely no contacts with the United Kingdom.[17] There were substantial contacts with the United States. The Abraham family had lived in the United States from 1969 to 1974;[18] Dr. Abraham, an eye surgeon, specializing in corneal transplants, had attended Johns Hopkins Medical School in Baltimore,[19] and had

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[13] Ramamurti Depo., pp. 13-14.

[14] Ramamurti Depo., p. 20.

[15] Ramamurti Depo., p. 28.

[16] Abraham Depo., pp. 37-38.

[17] Abraham Depo., pp. 19, 22, 23.

[18] Abraham Depo., p. 4.

[19] Abraham Depo., pp. 12-13.

become licensed to practice in Maryland, Virginia and Florida.[20] The family had obtained "green cards" entitling them to remain as permanent residents,[21] and only his sense of honor and obligation to the Seventh Day Adventist Church, which had supported and sponsored his medical education, compelled him to return to India to repay his church with service.[22]

Even after returning to India, the Abrahams filed U.S. Income Tax Returns for 1974, 1975 and 1976[23] and Mrs. Abraham continues to file such returns.[24]

It was always the intention of the Abraham family to return to the United States to settle permanently[25] and indeed, they even left a bank account of $6,000.00 in the United States when they returned to India in 1974.[26] After the accident, the Abraham family returned. Mrs. Abraham is employed as a nurse at the University of Maryland Hospital.[27] She bought a home costing $78,000.00,[28] and three of the four children attend local schools in Baltimore,[29] while the fourth child Annie, was expected to join the family as soon as her schooling in India was complete.

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[20] Abraham Depo., p. 25.

[21] Abraham Depo., pp. 31-32.

[22] Abraham Depo., pp. 13-14.

[23] Abraham Depo., pp. 32-33.

[24] Abraham Depo., p. 33.

[25] Abraham Depo., p. 17.

[26] Abraham Depo., pp. 39-40.

[27] Abraham Depo., p. 18.

[28] Abraham Depo., p. 30.

[29] Abraham Depo., p. 29.

Mrs. Abraham has members of her own family here[30] as well as members of her husband's family.[31] It is obvious that when the action commenced, contacts with the United States were of a permanent and lasting nature.

J. Willard Nalls, Jr., a Maryland attorney in Montgomery County, was appointed as Administrator of the Estate of Dr. John C. Abraham because he is a reliable, responsible person and only because Mrs. Abraham was not qualified to serve since she was not yet an American citizen.[32] Md. Code § 5-105. Such appointment would have been necessary even if the accident had occurred in the District of Columbia. D.C. Code § 20-351.

Rolls-Royce is a large engine and aerospace manufacturer doing business around the world,[33] with representatives in India, Japan, and the United States,[34] and many other countries including Brazil and France. Rolls-Royce aircraft engines are used in Lockheed L-1011 and Boeing 747 aircraft manufactured in the United States, and a Rolls-Royce engine is being used in the Boeing 757 aircraft now being manufactured in the State of Washington; a Rolls-Royce engine, the Pegasus, powers the U.S. Marines AV-8 aircraft. Travelling around the world on business related matters is not unusual for Rolls-Royce personnel. Although Mr. Keep's 1980 affidavit, alluded to only one witness in Seattle,[35] there are undoubtedly many Rolls-Royce engineers, technicians and employees working in the United States today, at its recently opened

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[30] Abraham Depo., pp. 28-29.

[31] Abraham Depo., pp. 35-36.

[32] Abraham Depo., p. 18.

[33] J.A. 123-124, par. 39.

[34] J.A. 61, par. 5.

office in Atlanta, Georgia and manufacturing plant in College Park, Georgia.

After Rolls-Royce filed its motion, defendants Air India and Aerospatiale also filed forum non conveniens motions. All motions were thoroughly briefed and submitted by June 1980. Briefs were supplemented after the decisions in *Pain* v. *United Technologies Corp.*, 205 U.S. App. D.C. 229, 637 F.2d 775 (D.C. Cir. 1980) and this Court's decision in *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 102 S.Ct. 252, 70 L.Ed. 2d 419 (1981).

B. Proceedings Below

On July 23, 1982, this court entered its Decision and Order denying the motion for dismissal on forum non conveniens grounds. On August 6, 1982, defendant Rolls-Royce moved to amend the order to provide for certification of the issue to the Court of Appeals in order to take an appeal under 28 U.S.C. 1292(b), and also filed a notice of appeal on August 19, 1982. Plaintiffs-respondents immediately filed motions to dismiss the appeals. The motion for certification was not denied until November 3, 1982.[36]

The motions to dismiss were under consideration by the district court for over two years and were ultimately decided on what the court characterized as a "close question,"[37] reflecting the court's careful consideration given to the various factors.

Rolls Royce filed its motion to dismiss on forum non conveniens grounds and to transfer to the United King-

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[35] J.A. 61, par. 5.

[36] J.A. 202

[37] R.A. 18. References preceded by the designation "R.A." refer to pages in the Plaintiffs'-Respondents' Appendix annexed to the Brief in Opposition herein.

dom in April 1980, almost two years after it filed its answer to the complaint, in which it raised forum non conveniens as a defense, and more than two years after commencement of the actions. Instead of moving in August 1978 to challenge the convenience of the forum, it chose to litigate the jurisdictional issue in the Court of Appeals. In the unpublished decision, affirming the finding of jurisdiction over Rolls Royce, the Circuit Court noted that Rolls Royce had not moved for dismissal on forum non conveniens grounds and indicated that its affirmance of Judge Sirica's decision, "was without prejudice to the consideration of the District Court of a motion to dismiss on that ground."[38] At that time however, the Circuit Court did not have before it the answer of Rolls Royce raising forum non conveniens as a defense. Rolls Royce did not, when it moved to dismiss on jurisdictional grounds, request the alternate relief of dismissal on forum non conveniens grounds.

SUMMARY OF ARGUMENT

Plaintiffs-Respondents motion to dismiss the Rolls Royce appeals was based on the grounds that the Circuit Court lacked jurisdiction over the appeals since the order denying the forum non conveniens motion was an interlocutory order, and not a final order and that piecemeal appeals were not favored. The district court declined to certify the question. Since the order does not present a clear question of law, but was based on the district court's exercise of discretion, it does not meet the criteria of the "collateral order" doctrine.

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[38] Nalls, etc. v. Rolls Royce, Ltd. No. 78-2282, January 17, 1980, fn.4.

I
THE ORDER BEING APPEALED DOES NOT MEET THE CRITERIA OF A FINAL ORDER

In federal courts appeals are permitted pursuant to 28 U.S.C. 1291 from final orders only, so as to avoid piecemeal review of a case *Domaco Venture Capital Fund* v. *Teltronics Services, Inc.*, 551 F.2d 508, 509 (2nd Cir., 1977); 9 Moore *Federal Practice* ¶ 110.06. The word "final" means concluding and dispositive. *Cammack* v. *Howard*, 81 U.S. App. D.C. 22, 154 F.2d 22 (D.C. Cir. 1946); *Turtle* v. *Institute for Resource Management*, 154 U.S. App. D.C. 341, 475 F.2d 925 (D.C. Cir. 1975).

Under 28 U.S.C. § 1291, the court of appeals is vested with "jurisdiction of appeals from all final decisions of the district courts . . . except where a direct review may be had in the Supreme Court." This language has consistently been interpreted to indicate that the courts of appeals would ordinarily exercise jurisdiction only when there has been a "decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgement.' " *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467 (1978), quoting *Catlin* v. *United States*, 324 U.S. 229, 233, (1945).

This court has a duty to dismiss an appeal whenever it becomes apparent that it lacks jurisdiction. *Green* v. *Department of Commerce*, 199 U.S.App. D.C. 352, 618 F.2d 836, (D.C. Cir. 1980). Thus, § 1291 furthers the important policy of avoiding piecemeal appeals which delay final resolution of the claim and require a greater allocation of judicial resources. It also stands in recognition of the considerable deference to which a district judge is entitled "as the individual initially called upon to decide the many questions of law and fact that occur in the course of trial." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981).

This is especially true in forum non conveniens cases where the scope of review is limited, and "an appellate court may not substitute its judgment for that of the district court in the absence of a clear abuse of discretion." *Pain* v. *United Technologies Corp.*, 637 F.2d 775, 779, 205 U.S.App. D.C. 229, (D.C. Cir. 1980) cert. denied, 102 S.Ct. 980 (1981).

In *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, (1949), the Supreme Court created a narrow exception to the final judgment rule of § 1291, specifically holding that the Court of Appeals had jurisdiction under § 1291 to review a district court's order which denied a defendant's motion that the plaintiff in a shareholder's derivative action be required to post security for costs of the litigation, as provided under state law. The court noted that to postpone review until final disposition of the action would effectively prevent meaningful review altogether, for by that time, whatever right to security the defendant may have had would be irreparably lost.[39]

In *Cohen* the Court held that the appeal was proper because the appealing party had been deprived of a "right" protected by state statute; i.e. security. It was not subject to the court's discretion. Thus, the Court reasoned that the harm to the appellant (the defendant) would be irreparable.[40] In other words, the defendant was entitled to the security by operation of law.

Unlike the "right" to security which was fixed by statute considered in the Cohen case, the alleged "right" claimed by Rolls Royce is not a fixed right, and forum non conveniens decisions are not pure questions of law; rather

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[39] 337 U.S. at 546-547.

[40] 337 U.S. at 546-547.

they represent an exercise of discretion and evaluation by the trial court of facts applicable to the practical conveniences and inconveniences posed to litigants and a court, in determining whether a particular action should be litigated in one court or another.[41]

Being one of discretion, the decision on this forum non conveniens motion is not eligible for review since it does not meet the criteria for an interlocutory appeal under the collateral order doctrine. In *Midway Mfg. Co.* v. *Omni Video Games, Inc.*, 668 F.2d 70 (1st Cir. 1980) the court stated:

> The well-established criteria for determining when an interlocutory appeal is permissible require that the order being appealed must be a final order that presents an issue of law, *not one of discretion*, that is separable from the issues to be presented at trial, and that cannot await resolution until appeal from the final judgment because *irreparable harm would be probable*. See, e.g., *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47, 69 S.Ct. 1221, 1225-1226, 93 L.Ed. 1528 (1949); *In re Continental Investment Corp.*, 637 F.2d 1, 4 (1st Cir. 1980), quoting *United States* v. *Sorren*, 605 F.2d 1211, 1213 (1st Cir. 1979). * * (Emphasis supplied)[42]

Not only is the lower court's decision a result of exercising discretion, but there has been no showing of any irreparable harm to Rolls-Royce, which seeks only a change of courtrooms. No substantive rights or defenses have been lost.

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[41] Pain, 637 F.2d at 781.

[42] 668 F.2d at 71.

II
ROLLS ROYCE HAS LOST NO SUBSTANTIVE RIGHTS

While Rolls Royce concedes that the appropriateness of the forum has no relationship to the underlying merits of the actions, it argues that the irrevocable loss to it will be " * * the right to be protected against duplicative and remote litigation" if these actions go forward.[43]

A forum non conveniens motion is essentially a motion for transfer of courtrooms. Decisions by a district judge on motion for a change of venue are not appealable as a final judgment under 28 U.S.C. 1291. *American Fidelity Fire Ins. Co.* v. *U.S. Dist. Ct for Northern Dist. (Cal.)*, 538 F.2d 1371, 1374 (9th Cir., 1976); *Ellicott Machine Corp.* v. *Modern Welding Co.*, 502 F.2d 178, 180-181, (4th Cir., 1974); *Clinton Foods, Inc.* v. *United States*, 188 F.2d 289, 290-291 (4th Cir. 1951); cert denied 342 U.S. 825 (1951); *Holzager* v. *Valley Hospital*, 482 F.Supp. 629, 633 (S.D.N.Y., 1979). This court has held in the past that a change of courtrooms is not "fundamental to the further conduct of the case." Gillespie v. United States Steel Corp., 379 U.S. 148, 154 (1964).

Rolls Royce also argues that plaintiffs have never identified any substantive rights they would lose, if these cases were brought in London;[44] yet neither has Rolls Royce ever shown that it has lost or will lose any substantive rights or defenses.

Plaintiffs did, however, show the District Court the prejudice it would suffer, and has suffered by the delay already endured, the prejudice they would encounter by having to pay large sums in attorneys fees, not only to

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[43] Rolls Royce petition, p. 14.

[44] *Id.* at 14.

their own solicitors, but to defendants counsel, if they were not successful because they would lose the important benefit of the contingent fee system.[45]

Rolls Royce claims that it is being subjected to duplicative litigation,[46] suggesting that these cases can be combined with 54 other cases involving 300 claimants, all of whom are Indian nationals, and who have no more contacts with the United Kingdom than do either of these plaintiffs. Judge Wilkey seized on this possibility.[47] But, Judge Wilkey either overlooked or gave no consideration to the posture of these British cases, whose very existence appears questionable. The English cases had been proceeding under Legal Aid Certificates issued by the Law Society, which had been revoked, thus automatically resulting in the discharge of the solicitors.[48]

Rolls Royce, a defendant here and in the English cases has been strangely silent concerning the status of the English cases and has steadfastly avoided any comment concerning their current status but has never denied the plaintiffs' claims that the English cases are at a standstill, if not totally dead.

The plaintiffs had good reason to sue in the District of Columbia. It was the only place where jurisdiction could be acquired over all the defendants, including Rolls Royce, the British manufacturer of the engines, Aerospatiale, the French manufacturer and assembler of the air-

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[45] The Supreme Court has recognized that in many foreign countries, the contingent fee system is not available. Piper, 454 U.S. at 252, fn. 18.

[46] Rolls Royce petition, p. 14.

[47] Rolls Royce petition, pp. 16-17; R.A.5

[48] J.A. 199-201.

craft, Indian Airlines which operated the aircraft and Air India which performed maintenance on the aircraft. Although the District of Columbia dismissed Indian Airlines for lack of jurisdiction, no order pursuant to Rule 54(b), F.R.C.P. was ever entered or even sought, and plaintiffs retain the right to maintain an appeal on this issue at the end of the case.[49]

Judge Wilkey found the ability to sue all defendants in one jurisdiction to be a factor favoring retention in the District Court. Even in dissent, Judge Wilkey found that there were many private interest factors which favored retention of the plaintiffs' claims in the District Court.[50] Judge Wilkey's Statement, however, appears to give greater emphasis to the "public interest" factors thereby avoiding the great weight, in plaintiffs' favor, of the private interest factors, which the District Court found favored retention. Yet, it is only when the trial judge finds that the balance of private factors is in or near equipoise, that "he must then determine whether or not factors of *public* interest tip the balance in favor of a trial in a foreign forum."[51] [Emphasis in original]

The lack of a connection with the District of Columbia is also not critical. Even if there is no connection with the District of Columbia, the fact that all defendants are present in this district and that discovery has been commenced and conducted in the district justifies keeping these cases in this district. See, e.g. *In re Air Crash at Barrow, Alaska on October 13, 1978*, 474 F.Supp. 996 (JPML, 1979).[52]

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[49] Moody v. Kapica, 548 F.2d 133 (6th Cir., 1976).

[50] R.A. 3.

[51] Pain v. United Technologies Corp., 637 F.2d at 784.

[52] An alien may be sued in any district. 28 U.S.C. 1391(d).

This Court has approved as fully justified, a greater deference being given to a plaintiffs' choice when made by resident or citizen plaintiffs as compared to the choice of a foreign plaintiff.[53] Such citizenship and residence are considered proxies for convenience.[54] Thus the District Court found that the real parties in interest in Ramamurti were United States citizens; and in Nalls, that the Abraham family were permanent residents and concluded that it was "both logical and convenient for them to file these actions here."[55]

In *Green* v. *Department of Commerce*, 199 U.S. App. D.C. 352, 618 F.2d 836, 839 (D.C. Cir. 1980) it was pointed out that "a party does not have the right to compel an appellate decision on a legal point unless it is necessary to his case.[56] The transfer sought by Rolls-Royce is not necessary to its case. Since Rolls Royce loses no substantive rights, the consequences of this order are by no means serious enough to warrant appeal.[57]

Rolls-Royce argues that without an appeal, it will be effectively foreclosed from any appellate consideration of the forum non conveniens issue. (Rolls Royce petition, p. 14). But this issue has not been shown to affect any substantive right as was the case in *Cohen* v. *Beneficial Loan Corp.*, *supra*, (security) or in *Chrysler Corp.* v. *Fedders Corp.*, 670 F.2d 1316 (3d Cir. 1982), at page 1518, n.2 (lis pendens) and "[t]here is nothing peculiar in the asserted 'claim of right' as compared to every other right

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[53] Piper, 454 U.S. at 255-256.

[54] *Id.* at 256, fn. 24.

[55] R.A. 17.

[56] 618 F.2d at 840.

[57] 618 F.2d at 841.

where denial of summary judgment is not appealable." *Freeman* v. *Kohl & Vick Machine Works, Inc.*, 673 F.2d 196, 200 (7th Cir. 1982).

In *Acton Corp.* v. *Borden, Inc.*, 670 F.2d 377 (1st Cir. 1977), the Court faced a similar issue involving an arbitration proceeding which became the subject of a "highly discretionary" stay proceeding, which would force the arbitration to be litigated in a different forum. The court could find " * * no important separable right likely to be lost. The only injury that inability to appeal can inflict on Acton is the need to litigate the issues of arbitrability in a different federal court."[58]

Even when, as Rolls Royce asserts,[59] the "practical" rather than "technical" construction commanded by Cohen is applied to the forum non convenience issue, *Abney* v. *United States*, 431 U.S. 651 (1977), and *Forsyth* v. *Kleindienst*, 599 F.2d 1203 (3d Cir. 1979) cert. denied sub nom *Mitchell* v. *Forsyth*, 453 U.S. 913 (1981) there is no basis for application of the Cohen rule.

In *Abney*, the Court concluded that denial of a motion to dismiss an indictment should be reviewed where the motion was based on double jeopardy. A finding of double jeopardy would give the defendant absolute immunity. In Forsyth, the court held that the order denying summary judgment was appealable where the motion was based on claims of absolute immunity. The Court referred to *Abney* as having set forth the following test:

> * * whether the relevant rights that were subject of the pretrial order would be 'significantly under-

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[58] 670 F.2d at 380.

[59] Rolls Royce petition, p. 13.

> mined' if appellate review had to await final action in the case.[60]

Unlike either of the above cases, resolution of this issue in Rolls Royce favor will not result in "absolute immunity" from suit, but merely change the place where the suit will be litigated.

Rolls Royce also urges the court to grant certiorari to avoid any confusion over what is a "final order," which it claims might result from the existence of the unpublished opinions in this litigation, and argues that failure to grant certiorari would encourage motions for certification.[61] There is no merit to this argument. It is difficult to apprehend how unpublished decisions can carry any authoritative weight, except in the case to which they apply. See e.g., Rule 8(f) of the Circuit Court of Appeals for the District of Columbia. But even if the opinions were published, they would probably not set compelling precedents, since each issue must be decided on its own set of facts, which a court must review separately, in the light of the particular litigation, to determine if a "final order" is involved or certification for immediate appeal under Sec. 1292(b) is appropriate.

CONCLUSION

Petitioner has not demonstrated any irreparable harm or loss of any substantive right or defense resulting from the denial of the motion for dismissal on forum non conveniens grounds and transfer to the United Kingdom. The order Rolls Royce seeks to appeal is not a "final order" within the meaning of *Cohen* v. *Beneficial Loan Corp.* and there is no basis for granting certiorari.

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[60] 599 F.2d at 1208.

[61] Rolls Royce petition, p. 10, 15.

The Statement by Judge Wilkey, joined in by Judge MacKinnon, "dissenting" from the denial of the motion for reargument *en banc*, circulated to the full Circuit Court of Appeals, does not justify a grant of certiorari to review the Circuit Court's dismissal of the appeal on the ground it lacked jurisdiction to hear an appeal from the order denying the Rolls Royce motion for dismissal on forum non conveniens grounds.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
for the District of Columbia Circuit

Filed March 8, 1983

ORDER

The suggestion for rehearing *en banc* of Rolls-Royce Limited has been circulated to the full Court. A majority of the members of the Court have not voted in favor thereof. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the suggestion is denied.

Per Curiam

Circuit Judges MACKINNON and WILKEY would grant the suggestion for rehearing *en banc*. A statement of *Circuit Judge* WILKEY is attached.

Statement as to Reasons for Voting for En Banc Consideration

WILKEY, *Circuit Judge*, with whom joined MACKINNON, *Circuit Judge:* Appellants ask us to review the district court's decision not to dismiss the suit against them on *forum non conveniens* grounds. Two judges of the motions panel considering the appeal, without opinion, dismissed for lack of jurisdiction. I believe that justice requires consideration of the *forum non conveniens* and appealability issues presented by this case by a merits panel or, failing that, *en banc*.

I. *Forum non conveniens* ISSUES

As the district court acknowledged, defendants' *forum non conveniens* motion presents a difficult legal question. We set

forth the applicable standard for *forum non conveniens* dismissals in *Pain* v. *United Technologies Corporation*:[1]

> [A] district judge's *forum non conveniens* inquiry should proceed in four steps. As a prerequisite, the court must establish whether an adequate alternative forum exists which possesses jurisdiction over the whole case. Next, the trial judge must consider all relevant factors of *private* interests, weighing in the balance a strong presumption against disturbing plaintiffs' initial forum choice. If the trial judge finds this balance of the private interests to be in equipoise or near equipoise, he must then determine whether or not factors of *public* interest tip the balance in favor of a trial in a foreign forum. If he decides that the balance favors such a foreign forum, the trial judge must finally ensure that plaintiffs can reinstate their suit in the alternative forum without undue inconvenience or prejudice.

Private interest factors include matters such as the relative ease of access to sources of proof, availability of compulsory process, and the cost of obtaining attendance of witnesses; public interest factors comprise the burden imposed by the trial in the community, the degree of local public interest in the dispute, and whether local or foreign law will be applicable.[2] Finally, *Pain* noted that the plaintiff's citizenship and residence in the United States merit no special consideration in this balancing process.[3]

A consideration of these factors shows that, at the very least, appellants may make a strong case for dismissal on *forum non conveniens* grounds.[4] First, it is clear that there is

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[1] 637 F.2d 775, 784-85 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

[2] *Id.* at 782, 786-91 (private interest factors); *id.* at 791-95 (public interest factors).

[3] *Id.* at 795-99.

[4] Our discussion draws on the factual findings of the district court in *Nalls* v. *Rolls-Royce Ltd.*, Memorandum Order at 1-3 (D.D.C. 23 July 1982).

an adequate alternative forum which possesses jurisdiction over this case. Fifty-four related suits, arising out of this accident and brought against these same defendants, are now before the English High Court, in London, England. Were plaintiffs' suits to be dismissed here, they could be consolidated with those in London.

Second, as to the factors of private interest, the most critical fact is that no event relative to plaintiffs' claim occurred in the United States. The accident itself occurred in India; the airplane which crashed was maintained in India by two Indian airlines; the plane was manufactured in France, and its engine manufactured in England. Hence, with the exception of one Rolls-Royce employee, "tangentially involved" with the facts of this case, who has now been transferred to Seattle, Washington, witnesses and documentary evidence as to the manufacture, maintenance and flight of the airplane are in France, England or India. And while some witnesses—members of the plaintiffs' family—who might testify as to the issue of damages live in the United States, other witnesses on this issue as well might have to be brought from India, where Nalls' decedent was a citizen and resided at the time of the accident.

On the other hand, some private factors do favor a trial in the District of Columbia. The District is the only place in the United States where plaintiffs can acquire personal jurisdiction over all the defendants—Air India, the French manufacturer, and the British manufacturer who are defendants of the present suit. Plaintiffs live in the United States, and hence it may be more convenient for them to bring suit here than in England. And it is arguably no more inconvenient for witnesses to travel to Washington, D.C., than to London, England, although we note that it is certainly more inconvenient for them to have to attend trial in both cities than in one. Finally, plaintiffs have agreed to mitigate the inconvenience to Rolls-Royce to some extent by deposing Rolls-Royce employees in England.

Third, with regard to the public interest factors, it is striking that there is absolutely no connection between this suit and the

District of Columbia, although there are some contacts with other parts of the United States. One decedent, an American citizen, lived with his family in the State of Washington; the other was a citizen of, and lived in, India, although he had been educated in the United States and planned at some point to return to Baltimore, where his wife and family lived. As we noted in *Pain*, this lack of contact reflects adversely both on the justification for burdening the community with a lengthy and complicated trial and on the interest the community might have in conducting the trial locally. Moreover, the applicable law is entirely foreign—Indian, English or French. There is thus no local or federal policy which might be vindicated in the present suit. And the trial court will have to resolve difficult questions of foreign law on the basis of expert testimony.

Fourth, plaintiffs maintain that they would suffer inconvenience or prejudice by having to reinstate their suit in London. They suggest the unavailability of attorneys on a contingent fee basis and the possibility this suit will suffer lengthy delays there or be "confused" in the related suits already brought. But these fears are absolutely unsubstantiated in the record or in the trial court's opinion. We are hardly free to assume that English courts are unable to do justice to plaintiffs' claims, and know of no evidence that these courts are any more dilatory than their American counterparts.

It is questionable, to say the least, whether the presumption in favor of plaintiff's forum choice survives a balancing of either the private or the public interest factors. This is hardly surprising for a suit which asserts claims under foreign law, arises out of an accident which occurred in a foreign country, and is brought against foreign defendants by plaintiffs who have no connection whatsoever with the District of Columbia. This suit causes the expense and harassment to defendants and witnesses, and imposes the burdens on our courts, which the *forum non conveniens* doctrine aims to prevent. Moreover, the main factor which favors plaintiffs' suit here—the American nationality, residence, or intended residence of plaintiffs and decedents—is precisely the factor which we took great

care, in *Pain*, to identify as carrying no special weight in the balancing process.[5] Finally, the prosecution of fifty-four suits, arising out of the same accident and asserting similar claims, before the Queen's Bench of the English High Court gives us the greatest possible assurance that plaintiffs may without demonstrable prejudice have resort to a foreign forum if the suit here is dismissed. Whether we could, given these facts, sustain the district court's decision on appeal presents for me a difficult and important question of *forum non conveniens* law.

I. APPEALABILITY

Rather than having this court proceed to review these difficult and important questions of *forum non conveniens* law, the motions panel dismissed the appeal for lack of jurisdiction. Appellants had contended that this court had jurisdiction under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*[6] I believe that the motions panel erred in this regard, and that review of the district court's decision is appropriate *now*.

The *Cohen* rule defines certain trial court decisions to be "final" although these decisions do not definitively adjudicate the entire controversy between the parties. The rationale of the rule is that some district court decisions, although interlocutory, may irrevocably dispose of rights of the parties and therefore should be reviewable at once. In particular, *Cohen*, as interpreted by subsequent cases, establishes three criteria for reviewability: (1) the decision must be conclusive, *i.e.*, not open to further consideration by the district court; (2) the decision must resolve an issue *separate* from the merits, rather than be a step towards final decision merged within the final judgment; (3) the decision must be effectively unreviewable on appeal from the final judgment in the case—*i.e.*, parties' rights will be significantly undermined if review is postponed until

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[5] *See* 637 F.2d at 797-99.

[6] 337 U.S. 541 (1949).

after final resolution of all issues in the case. In sum, as the Supreme Court recently described the class of reviewable "collateral orders," "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."[7]

The instant case meets each of the three criteria for appealability. *First*, the district court's decision is conclusive for all practical purposes. While it is in theory possible that the district court may at some future point decide to dismiss on *forum non conveniens* grounds, it seems most unlikely that it would do so. Defendants have already laid before the court the various reasons why litigation in this forum would impose undue burdens on them, on witnesses and on the court. The court, not persuaded by these arguments now, is unlikely to change its mind after significant time and resources have already been invested in pleadings, discovery, and other preparation for trial. Moreover, given these factors discussed above, it is hard to imagine this case becoming any *less* appropriate for trial here than it already is.

Second, the district court order decides an important issue collateral to the merits. It is clear that the decision as to the appropriate forum does not require decision as to the merits of the controversy. And the decision as to the appropriate forum is in no way "merged" into a final judgment on the merits. This is because the rights at stake in these two decisions are fundamentally different. The decision on the merits, of course, disposes of plaintiff's substantive rights, while the *forum non conveniens* decision addresses defendant's rights (and the rights of other participants in the law suit) to be tried in a forum convenient to them and to be free from vexatious and harassing litigation.

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[7] *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). *See also Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 308, 374-75 (1981); *Abney* v. *United States*, 431 U.S. 651, 658-62 (1977); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170-72 (1974); *Cohen*, 337 U.S. at 545-47.

Moreover, the *forum non conveniens* decision is sufficiently important to warrant immediate review. The Supreme Court, when first establishing in *Gulf Oil Corp.* v. *Gilbert*[8] the power of the federal courts to dismiss cases on *forum non conveniens* grounds, declared the importance of *forum non conveniens* doctrine as a means of protecting the rights of litigants as well as promoting efficient administration of the courts.[9] As *Piper Aircraft Co.* v. *Reyno*[10] states, "[u]nder *Gilbert*, dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the court"[11]—surely considerations of importance.[12]

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[8] 330 U.S. 501 (1947).

[9] *Id.* at 507-09.

[10] 454 U.S. 235 (1981).

[11] *Id.* at 249.

[12] Plaintiffs cite cases involving the choice of forum for arbitration proceedings, *Acton Corp.* v. *Borden, Inc.*, 670 F.2d 377, 380-81 (1st Cir. 1982); *USM Corp.* v. *GKN Fasteners, Ltd.*, 574 F.2d 17, 19 (1st Cir. 1978); *New England Power Co.* v. *Asiatic Petroleum Corp.*, 456 F.2d 183, 185-86 (1st Cir. 1972), to show that the rights protected by the *forum non conveniens* doctrine are too insignificant to warrant invocation of the collateral order doctrine. But cases involving choice of forum for arbitration are clearly distinguishable. Orders to arbitrate enforce a prior contractual agreement, and courts may justifiably conclude that the *place* of arbitration is less important to the parties when they have the opportunity to specify the place in the contract and fail to do so. Of course, no such prior agreement was possible in the present case. Moreover, arbitration agreements are made enforceable in court by a specific congressional enactment, the Federal Arbitration Act. This act strongly endorses values of the efficiency and speed of arbitration, values which would be undercut by extended litigation over the forum of arbitration. In contrast, no such congressional policy is at issue here. Finally, the inconvenience to the parties at issue in the choice of an arbitration forum will be much less than in the present case, because arbitration will generally occur within the United States and rely heavily on documentary evidence rather than live witnesses.

Plaintiffs also suggest that wholly discretionary decisions, such as consideration of *forum non conveniens* motions, should not be appealable under *Cohen* because they simply cannot present a question "too important to be denied review." Arguably, the exercise of the trial judge's discretion is less likely to be reversed and offers less reason for intervention to guide the trial court's decision.[13] But the Supreme Court decisions on the collateral order doctrine do not support the proposition that a discretionary decision is generally not appealable under this doctrine. The Supreme Court's general pronouncements in recent cases simply do not mention discretion at all as a factor to be considered. And the courts of appeals have, in numerous instances, granted review of collateral orders for abuse of discretion.[14]

The *Cohen* case did observe that "[i]f the right were admitted or clear and the order involved only an exercise of discretion as to the amount of security, a matter the statute makes subject to reconsideration from time to time, appealability would present a different question."[15] But this delphic remark hardly precludes review of "discretionary" decisions under *Cohen* doctrine. Instead, this language could mean simply that

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[13] Of course, this argument, to the extent convincing, is a matter of intuition rather than logic, for one cannot deduce the answer to the empirical question of how often judges' decisions on a given issue are reversible from the standard of appellate review alone, without knowing how often in fact trial judges transgress that standard.

[14] *See, e.g., Lowe* v. *Pate Stevedoring Co.*, 595 F.2d 256, 257 (5th Cir. 1979) (award of attorneys' fees); *Caston* v. *Sears, Roebuck and Co.*, 556 F.2d 1305, 1308 (5th Cir. 1977) (appointment of counsel); *Flowers* v. *Turbine Support Division*, 507 F.2d 1242, 1244 (5th Cir. 1975) (permission to proceed in forma pauperis); *Garber* v. *Randell*, 477 F.2d 711, 715, 718 (2d Cir. 1973) (consolidation); *Norman* v. *McKee*, 431 F.2d 769, 773-74 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971) (approval of partial class settlement); *MacAlister* v. *Guterma*, 263 F.2d 65, 67, 69 (2d Cir. 1958) (pretrial consolidation).

[15] 337 U.S. at 547.

an order as to amount might not be reviewable because not conclusive—*i.e.*, because the district court retained discretion to modify the amount.

More importantly, even if *Cohen* does suggest that appellate courts should be more hesitant to grant immediate review of discretionary collateral decisions, its use of the term "discretion" is ambiguous. A decision may be "discretionary" either in the sense that there is "no law to apply"—*i.e.*, no standards to guide the trial court's decision—or in the sense that standards to be applied are sufficiently flexible and fact-dependent so that a broad range of outcomes will be reasonably consistent with the applicable standards. In the former case, courts of appeals may decline to review a collateral order because it is futile to attempt to second-guess what is essentially an arbitary decision. For example, in *United States* v. *Sorren*,[16] the court declined to review the trial court's refusal to grant an evidentiary hearing on the personal jurisdiction issues raised by *United States* v. *Toscanino*,[17] because "the remand in *Toscanino* explicitly granted the district court discretion to determine whether such an evidentiary hearing was warranted."[18] The *Toscanino* issue exemplifies the case in which the district court exercises discretion because there is no law to apply; as to the circumstances in which the trial court enjoyed discretion as to whether to hold a hearing, the court's remand was essentially standardless.[19]

An exemplary case of the second type of discretionary decision—a decision guided by flexible, open-ended standards—is the Supreme Court decision in *Stack* v. *Boyle*.[20]

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[16] 605 F.2d 1211 (1st Cir. 1979).

[17] 500 F.2d 267 (2d Cir. 1974).

[18] 605 F.2d at 1215.

[18] 500 F.2d at 281. *See also Midway Mfg. Co.* v. *Omni Video Games, Inc.*, 668 F.2d 70, 72 (1st Cir. 1981) (no statutory standards at all governing the decision that the court declined to review).

[20] 342 U.S. 1 (1951).

There the Court held reviewable under the collateral order doctrine the question whether bail was "excessive." Clearly, the decision fixing the amount of bail is discretionary in the second sense noted above, for this decision is general[l]y] acknowledged to leave much leeway to the judicial officer below.[21] Nonetheless, the Supreme Court held the decision immediately reviewable. Moreover, the Court's reasoning confirms that *Cohen's* dictum as to the nonreviewability of "discretionary" orders refers to discretion in the sense of "no law to apply." In *Stack*, "[p]etitioners' motion to reduce bail did not merely invoke the discretion of the District Court setting bail within a zone of reasonableness . . . As there is no discretion to refuse to reduce excessive bail, the order denying the motion to reduce bail is appealable . . . [citing *Cohen*]."[22] Once within the zone of reasonableness, the amount of bail, like the amount of security in *Cohen*, is an essentially standardless decision which it would be futile to review; but review of the discretionary collateral order is available to determine whether the decision lies within that zone—*i.e.*, reasonably applies relevant legal standards.

Similarly, *forum non conveniens* law comprises flexible standards whose application by the trial court should be immediately reviewable for abuse of discretion. We set out these standards in *Pain* v. *United Technologies Corp.*[23] To use the "discretionary" label as a way of deprecating the importance of the *forum non conveniens* decision ignores the expense, hardship and injustice to parties and witnesses, as well as costs to the administration of justice, which trial in the wrong forum may cause. *Forum non conveniens* motions thus present an issue collateral to the merits and important enough to warrant prompt review.

Third, the district court's decision is effectively unreviewable on appeal from the final judgment on the merits. The

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[21] *See, e.g., Allen* v. *U.S.*, 386 F.2d 634, 636 (D.C. 1967).

[22] 342 U.S. at 6.

[23] 637 F.2d at 781-85.

rights conferred by *forum non conveniens* law—the right not to be tried in an unreasonably inconvenient forum—will be effectively extinguished if review is postponed. Perhaps the closest analogy would be a district court's denial of a motion to dismiss on double jeopardy grounds. As the Supreme Court held in *Abney* v. *United States*,[24] the right conferred by the double jeopardy clause—the right *not to stand trial* a second time for the same offense—is effectively denied when the trial proceeds, regardless of its outcome. Similarly, as the Court notes in *Abney*,[25] the *Cohen* case—which established the collateral order doctrine—can be interpreted to hold that at stake there was the right of the corporation *not to stand trial at all* unless the shareholder suing derivatively posted security for defendant's cost of litigation. Such a right not to stand trial is at issue in the present appeal. After the trial is concluded, all the expenses and burdens of trial in the inconvenient forum have already been incurred. To delay review until a final judgment is entered is to deny review altogether.

Plaintiff-appellee notes that decisions on motions made under 28 U.S.C. § 1404(a), for transfer of cases from one court to another *within the United States*, are not appealable under the collateral order rule. Such motions, however, are clearly distinguishable in this context from motions to dismiss on *forum non conveniens* grounds. Indeed, *All States Freight* v. *Modarelli*,[26] a leading case on review of section 1404(a) motions, emphasizes that "the *forum non conveniens* doctrine is quite different from section 1404(a)."[27] On review of the same case, the Supreme Court quoted this language with approval in holding that section 1404(a) was a revision rather than merely a codification of *forum non conveniens* doctrine,[28] and the Court

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[24] 431 U.S. 651 (1977).

[25] 431 U.S. at 662 n.7.

[26] 196 F.2d 1010 (3d Cir. 1952).

[27] *Id.* at 1011.

[28] *See Norwood* v. *Kirkpatrick*, 349 U.S. 29, 31 (1955).

recently had occasion to reaffirm these differences in *Piper Aircraft Co.* v. *Reyno.*[29]

In particular, several of the differences between section 1404(a) and *forum non conveniens* motions suggest that denial of the latter should be appealable even though denials of the former are not. First, Congress' purpose in enacting section 1404(a) was to make the judicial process "cheaper and more convenient and, if possible, more prompt."[30] In deciding whether section 1404(a) motions are appealable, courts are inevitably bound to further Congress' purpose in enacting the statute; hence, considerations of speed and expense come to the forefront. These considerations of course militate against appealability under the collateral order rule. As *All States Freight* noted, "instead of making the business of the courts easier, quicker and less expensive, we [would] now have the merits of the litigation postponed while appellate courts review the question of where the case may be tried."[31] In contrast, *forum non conveniens* doctrine has its roots in the common law:[32] in deciding the appealability of rulings under this doctrine, considerations of expense and speed, though clearly significant, need not be paramount to the rights of litigants or to the public interests which the doctrine was designed to protect.

Second, section 1404(a) "was designed as a 'federal housekeeping measure,' allowing easy change of venue within a *unified federal system.*"[33] Therefore, significantly more is at stake for the parties in a *forum non conveniens* than in a section 1404(a) motion. For example, transfer under section

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[29] 454 U.S. 235, 253-55 (1981).

[30] *All States Freight*, 196 F.2d at 1011.

[31] *Id.*

[32] *See Piper Aircraft*, 454 U.S. at 248 n.13.

[33] *Id.* at 254 (quoting *Van Dusen* v. *Barrack*, 376 U.S. 612, 613 (1964)).

1404(a) cannot change the law applicable in the suit, while dismissing on *forum non conveniens* grounds may in effect force the suit to be brought in a jurisdiction applying different law.[34] And transfer to a foreign court may therefore solve problems associated with the American court's applying unfamiliar foreign law, while section 1404(a) cases never address this problem. More generally, the differences between trial in an American court and a foreign court will almost inevitably be greater than those between trial in two federal courts in the United States. Hence, when the defendant makes a *forum non conveniens* motion, he asserts interests which must transcend those which may be at stake in a section 1404(a) motion and which therefore may deserve more careful judicial consideration.

Of course, section 1404(a) transfers are analogous to dismissal under *forum non conveniens* law in some respects. First, both are discretionary with the district judge; second, the parties do not lose the rights secured by their underlying claims; third, interlocutory review would cause delay. The first point—the relevance of "discretion"—has been discussed. The second and third points do not distinguish these decisions from those for which review is available under the collateral order doctrine. All collateral orders preserve the appellant's underlying claims, for that is what makes them "collateral"; and all collateral orders are reviewable only at the cost of delay. So the fact that *forum non conveniens* and section 1404(a) motions also possess these features tells us nothing about why one or the other is, or should be, reviewable. Rather, what is relevant here are those features which both distinguish *forum non conveniens* from section 1404(a) motions and underscore the justification for prompt review of *forum non conveniens* decisions: the manifestly greater differences between U.S. and foreign, as opposed to two federal, forums; and the different purposes underlying the two doctrines.

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[34] *Compare Van Dusen* v. *Barrack*, 376 U.S. at 639, *with Piper Aircraft*, 454 U.S. at 247.

III. Conclusion

Thus, I conclude that the trial court's decision not to dismiss on *forum non conveniens* grounds meets the three criteria for appealability under the collateral order doctrine and therefore that the motions panel was incorrect to dismiss the appeal for lack of jurisdiction. The result of the dismissal is that no court has given full consideration to appellants' claims. No written opinion has been issued by this court on the questions of *forum non conveniens* or of appealability. This cursory treatment follows upon the disposition of these issues in the district court in a five-page opinion which failed to apply—indeed, failed to mention—the four-part test for the application of *forum non conveniens* doctrine laid down for this circuit in *Pain*, and which gave only incomplete attention to the applicable Supreme Court precedent. The district court thus failed to consider "all relevant factors" as required by *Pain*, while reaching a result diametrically opposite to the result we affirmed on the facts in that case. It is this decision—based on a failure to apply the relevant standards—which this court now declines to consider further. Moreover, the district court declined the request for certification of interlocutory appeal without opinion; thus, no court has even evaluated the appealability of this order in a written opinion.

At a minimum, we should remand to the district court for consideration of the *forum non conveniens* issue in light of the standards set down in *Pain*. More appropriate still would be full consideration by this court of the merits of appellants' claims. I am reluctant to recommend *en banc* consideration of any case. However, since the motions panel has declined to refer the case to argument on the merits, *en banc* consideration of the district court's decision here provides the only way to correct the district court's error and to reestablish a uniform rule for the circuit. Without such consideration, we fail to do justice to these litigants and to protect our circuit from abuses of jurisdiction such as this. On that basis, I believe that *en banc* consideration is justified, either on the merits or to direct that the case be reconsidered after argument before a panel to be selected in conformance with our usual practice.

United States Court of Appeals
for the District of Columbia Circuit

Filed December 22, 1982

ORDER

BEFORE: Wright and Bork, Circuit Judges and McGowan, Senior Circuit Judge

On consideration of appellee's motion to dismiss, the response thereto and of the reply, it is

ORDERED by the Court that the aforesaid motion is granted and these appeals are dismissed. It is

FURTHER ORDERED by the Court, *sua sponte*, that the Clerk withhold issuance of the mandate until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended June 15, 1982.

Per Curiam

Circuit Judge Bork did not participate in this order.

United States District Court
for the District of Columbia

MEMORANDUM ORDER

These two cases arise out of a crash of an Indian Airlines Corporation airplane in the Republic of India during a regularly scheduled flight from Bombay, India to Madras, India, on October 12, 1976. The plaintiffs allege that the aircraft was a Caravelle manufactured in Toulouse, France, in 1967 by Aerospatiale (SNIAS) (Societe National Industrielle Aerospatiale). The case is now before the Court on the motions of the defendants to dismiss on the grounds of forum non conveniens.

I

The plaintiff, Carol E. Ramamurti and her daughter are American citizens. The decedent, Dr. Ramamurti was an American citizen and had been employed as a physician with Group Health Organization, practicing orthopedics and living in Seattle, Washington, for almost twenty years. Other than visiting relatives in India, Dr. Ramamurti had no contacts with India and none whatsoever with the United Kingdom. His family continues to reside in the Seattle area and his daughter attends the University of Washington in that city. His wife is the administratrix of his estate.

The plaintiff in the second case, J. Willard Nalls, Jr., is the administrator of the estate of John Abraham. Dr. Abraham was an eye specialist who attended Johns Hopkins Medical School in Baltimore, Maryland, and was licensed to practice in Maryland, Virginia and Florida. Although Mrs. Abraham is an Indian citizen, she and her daughter have qualified for permanent residence with the issuance of "green cards" and intend to become American citizens as soon as they have met their residency requirements. The family has relatives in India but

has no contact with the United Kingdom. The plaintiff represents that they are permanent residents in this country and that "only the sense of honor and obligation to the Seventh Day Adventist Church, which had supported and sponsored his [Dr. Abraham's] medical education, compelled him to return to India to repay his church, by serving his church." Plaintiffs Opposition at 10. They filed federal income tax returns for 1974, 1975 and 1976 and Mrs. Abraham continues to file such returns. She is employed at the University of Maryland Hospital as a nurse and they own a home in that state.

For the purposes of the pending motions, the Court is satisfied that the plaintiffs have permanent residence in the United States and that it is both logical and convenient for them to file these actions here.

Air India contends that under the criteria of *Gulf Oil Co.* v. *Gilbert*, 330 U.S. 501 (1947), the proper forum for the case is the Republic of India for the reason that the accident occurred there, the investigation of the accident took place there, the evidence concerning the accident is located there, and litigation concerning the accident is pending there. Air India does not however oppose the position of Rolls-Royce that the United Kingdom would also be an appropriate forum. It notes that Air India and Rolls-Royce are also parties to related litigation pending in the courts of the United Kingdom.

Rolls-Royce argues that the cases should be dismissed because the District of Columbia is not an appropriate forum. It contends that the proper forum for these cases is the United Kingdom. It notes that Dr. Ramamurti was visiting family members in India and that Dr. Abraham was returning to his home in Vellore, India, from a conference in Las Vegas. This defendant also relies on the following facts in support of its motion: (1) The connecting flight which crashed between Bombay and Madras was operated by Indian Airlines, an Indian corporation which is not present in this forum for jurisdictional

purposes,* (2) the Caravelle aircraft was manufactured in France, (3) Rolls-Royce, an English company, manufactured the Avon Jet Engines which powered the plane and (4) the manufacture of the engines took place entirely within the United Kingdom. Rolls-Royce conducted an investigation at the request of the Indian Court of Inquiry and tests on the engines and their components were conducted in the United Kingdom. The official written records of the investigation are located in India.

The defendants also note that 54 similar suits have been initiated before the Queen's Bench Division of the English High Court. Rolls-Royce contends that both private and public interest factors, *see Gulf Oil Corp.* v. *Gilbert*, *supra*, 330 U.S. at 508-509, "compel the conclusion" that this litigation should be pursued in the United Kingdom or possibly the Republic of India, but not in the District of Columbia which allegedly has no connection with the controversy.

II

Although the motions present a close question, the Court concludes that the motions to dismiss should be denied. "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Co.*, *supra*, at 508. The plaintiffs live in this country and witnesses on the issue of damages also live here. While it is true that many witnesses who would be called are located outside of the country, some would come from India and others from the United Kingdom, thus the United States is a midway point. Due to the fact that the aircraft and its components were manufactured in the United Kingdom and France, the aircraft crashed in India and the official report and investigation was performed there, and the plaintiffs and their witnesses live in this country, it is obvious that no matter where the case is tried someone will suffer an inconvenience. Rolls-Royce will have its

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*See *Ramamurti* v. *Rolls-Royce Ltd.*, 454 F. Supp. 407, 413 (D.D.C. 1978).

expenses minimized however since plaintiffs have agreed to have their counsel travel to England to depose Rolls-Royce employees. Moreover, there is an indication that some of the Rolls-Royce employees are or may be located in Seattle, Washington. Rolls-Royce being the employer will also be able to compel the attendance of its witnesses for any trial conducted in this country.

An additional concern in this case is the cost and availability of counsel for the plaintiffs if the case is dismissed. Plaintiffs are presently represented on a contigent fee basis by counsel who has almost 20 years experience in this specialized area of the law. If the cases are dismissed, representation for the plaintiffs in England will pose serious problems.

The fact that the substantive law in the United Kingdom or India may be less favorable to the plaintiff is no longer a basis to defeat a motion to dismiss on grounds of forum non conveniens. *Piper Aircraft Co.* v. *Reyno*, 102 S.Ct. 252, 265 (1981).

The Court notes also that plaintiffs choice of forum does not represent a misuse of venue and there is no suggestion that plaintiffs sought to file the case in the most inconvenient place for the defendants. While there is no doubt that the trial of the case in this forum will pose some inconvenience to the defendants, the Court concludes those defendants are better able to bear the inconvenience than the plaintiffs, and that there is no reason why the plaintiffs choice of forum should now be disturbed. In view of the above the Court concludes that the motions to dismiss should now be denied.

ORDER

It is hereby

ORDERED that the defendants motion to dismiss these cases on grounds of forum non conveniens is denied, and it is further

ORDERED that discovery may proceed.

Dated: July 23, 1982

Office-Supreme Court, U.S.
FILED
MAY 25 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1646

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

ROLLS-ROYCE LIMITED,
Petitioner,

v.

J. WILLARD NALLS, JR., As Administrator for the Estate of JOHN C. ABRAHAM, Deceased, CAROL E. RAMAMURTI, As Administratrix For the Estate of CHINNI P. RAMAMURTI, Deceased,
Plaintiffs-Respondents,

AIR INDIA, INC., and AEROSPATIALE (SNIAS) (Societe National Industrielle Aerospatiale),
Defendants-Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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AIR INDIA, INC., and AEROSPATIALE (SNIAS) (Societe National Industrielle Aerospatiale),

Defendants-Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI*

Respondents' brief in opposition offers no appropriate basis for the denial of certiorari. They concede, as they must, that these two wrongful death cases have *no* contact whatsoever with the United States District Court for the District of Columbia, but nonetheless assert that certiorari would be inappropriate because the denial of petitioner's motion to dismiss for *forum non conveniens* is not reviewable under the collateral order rule established in *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), either because it does not affect a sub-

*Petitioner's affiliates and subsidiaries are listed or described in the petition.

stantive right of petitioner or, if it does, because the disposition of such motions is within the sole discretion of the district judge. Both propositions are incorrect.

Unlike a denial of a change of courtrooms sought by a motion to transfer under 28 U.S.C. § 1404(a), petitioner is faced with preparing and trying this complicated aircraft disaster litigation twice rather than once, with one situs a remote forum where none of the underlying facts of the litigation occurred, where none of the evidence exists, and where the court is unfamiliar with all applicable substantive law. Surely the right to be free from such duplicative litigation is a substantive right as to which, as Circuit Judges Wilkey and MacKinnon found, "the district court's order is conclusive for all practical purposes."[1]

In *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 234 (1981), this Court concluded as a matter of law that a plaintiff could not defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable than that of the present forum. Here, respondents urge that the district court's decision is unreviewable although the only point urged in their brief to sustain the district court's "discretion" would be the loss of the American contingent fee system for paying lawyers if the cases were to be litigated in England with the 54 others arising from the same accident. The issue presented here is no different from that presented in *Piper Aircraft*, since all that is urged to support the district court's denial of the motion is that lawyers in

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[1] Appendix to the petition ("Pet. App."), at 6a. In addition, the decision below has now been reported. *See* 702 F.2d 255, 258 (D.C. Cir. 1983).

England are arguably more expensive than lawyers in the United States.

Respondents would mask the absence of any contact with the District of Columbia by urging various miscellaneous connections with the United States as a whole. From this they argue that as U.S. residents their selection of a remote forum is entitled to great weight. At least before the decision of these cases, however, it had been settled that residence (here in Washington State or Maryland) or even American citizenship is "largely irrelevant" to motions based upon *forum non conveniens*. *Pain* v. *United Technologies Corp.*, 637 F.2d 775, 797 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981).

The denial of petitioner's motion to dismiss for *forum non conveniens* "appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. at 546. Precisely as *Cohen* demands, a significant issue has been decided which is separable from and collateral to the merits, and which will result in irreparable loss if an appeal is denied. Without review, Rolls-Royce will be denied any realistic opportunity for appeal, and the appealability of similar decisions will be left uncertain. The result will be needless burdens upon litigants and the lower courts. Strong considerations of efficient judicial administration warrant review of the decisions below.

With respect to the substantive issue of *forum non conveniens*, the district court's decision introduces confusion and uncertainty into the standards applicable to the issue. It conflicts both with the rules of law adopted

by this Court and with earlier decisions of the courts of appeals. Without review, "abuses of jurisdiction" will be encouraged,[2] and needless additional obligations will be imposed upon already-overburdened courts.[3]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[2] Pet. App. at 14a; 702 F.2d at 262.

[3] One insignificant change has occurred, or will soon occur, in the facts as they existed at the time of the petition. An employee of Rolls-Royce who was based in England at the time of the accident subsequently moved to Seattle, Washington. He has now moved, or will soon move, to the District of Columbia area. Judges Wilkey and MacKinnon correctly assumed below that this employee was only "tangentially involved" in the relevant events, Pet. App. at 3a, 702 F.2d at 256, and Rolls-Royce does not expect any testimony he might have to be material. No other employee of Rolls-Royce with the slightest relevance to these cases is anywhere in the United States.